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CHURCH FINANCE AND PROBLEMS OF ALIENATION

PROBLEMS of Church finance are avowedly among the most vexatious difficulties in the entire field of Canon Law. And these problems become even more bewildering in the United States in view of the special burdens and complexities of ecclesiastical organizations in this Country. For instance, the organization of a parish here involves many more financial responsibilities than in most other countries. In the United States a parish unit normally and ordinarily consists of a church building, an elementary school and perhaps even a high school, a rectory, a residence for teaching Sisters and sometimes even a hall for educational, social and recreational purposes. The direction of such a vast organization entails many financial transactions such as loans, mortgages, investments, leases and the like. An attempt is made, in the following pages, to enunciate some of the principles of Canon Law affecting such transactions.[1]

I. The Alienation of Ecclesiastical Property

Alienation is generally understood to be any legally-binding act by which either the property, real rights or legal possession vested in an ecclesiastical person or corporation are, either gratuitously or contractually, transferred, renounced,

[1] A volume, by the Author, giving complete information on these matters and entitled: *Practical Problems in Church Finance,* is being published this month by Bruce Publishing Company.

diminished, jeopardized or burdened.[2] And thus it is that Canon 1533 states that "the formalities demanded according to the rulings of Canons 1530-1532 are required not only in alienation properly so-called; but also in any contract in which the status of the Church may become less secure."[3] The Sacred Congregation for Religious clearly emphasized the same principles in its Letter, promulgated by the Apostolic Delegate to the local Ordinaries and Religious Superiors of the United States on November 13, 1936, wherein it was stated:—"The term alienation includes not only purchases or transfers of property, but includes as well any contract, debt or obligation. The Canon Law regards all transactions, which may render the financial condition of the institute or religious house less secure, as alienations."[4]

Before any ecclesiastical goods or property may be alienated, the following are required:—

1. An appraisal to be made in writing by trustworthy experts.
2. A just cause: that is, urgent necessity, obvious advantage to the Church, or piety.
3. The permission of the lawful Superior, without which alienation is invalid.[5]

[2] A more comprehensive description of alienation is given by Wernz-Vidal:—"Alienatio bonorum ecclesiasticorum hoc loco sumitur sensu lato, quatenus denotat actum, quo in alium transfertur rei dominium (venditio) aut rei usus vel usufructus (locatio) aut aliud ius in re (hypotheca). Quare in materia nostra alienatio non solum denotat omnem actum, quo bonum quoddam temporale ex dominio directo alicuius ecclesiae vel instituti ecclesiastici in dominium alterius subiecti sive ecclesiastici sive saecularis transfertur, sed etiam comprehendit illos actus legitimos, quibus bona ecclesiastica, retento dominio directo, quoad dominium utile vel usumfructum transferuntur aut aliis iuribus in illa concessis periculo amissionis exponuntur aut ad longius tempus directae possessioni Ecclesiae subtrahuntur aut generatim peioris conditionis fiunt." *Ius Canonicum*, Tom. IV, Vol. II, n. 757, p. 222.

[3] Of course, it is taken for granted that all the readers understand the distinction between administration and alienation of Church property.

[4] Letter, November 13, 1936, N.P. 173/35.

[5] Can. 1530.

It is to be noted that a just cause, such as urgent necessity or obvious advantage to the Church or piety, would be necessary for the licitness of alienation. Urgent necessity is usually viewed as the payment of a pressing debt, the redeeming of a mortgage, the danger of rapidly-declining values, an opportunity to sell at particularly advantageous prices in view of an urgent demand, the restoration of a collapsing or damaged church-building, the purchase of sacred vessels, vestments, and other indispensable objects.[6]

Whenever alienation is contemplated in view of obvious advantage to the Church, the benefits accruing to the ecclesiastical corporation must be appreciable before alienation is warranted. Moreover, the benefit must redound to the Church, not to some individual in an ecclesiastical organization.

II. Proper Permission of the Lawful Superior

Canon 1530 § 1, 3°, with unmistakable clearness, emphasizes the fact that alienation is invalid without the permission of the lawful Superior. Usually, this lawful Superior is the Ordinary, the Religious Superior or the Holy See, according to the nature of the alienation and the amount involved.[7] Thus, Canon 1532 §§ 2, 3 enacts that "the local Ordinary is the lawful Superior in matters which do not exceed the value of one thousand lire or francs, after consultation with his board of administration, unless the matter is of slight importance, and with the consent of the interested parties. In the case of goods valued at between one thousand lire and thirty thousand lire or francs, the local Ordinary is authorized to grant permission, provided he has secured the consent of the Cathedral Chapter (Board of Diocesan Consultors), of the board of administration and of the interested parties." [8]

[6] Barbosa, III, 30, 12; Reiffenstuel, III, 13, 18.

[7] This article does not consider the canonical legislation on alienation as it applies directly to Religious. These norms are treated at length by the Author in *Practical Problems in Church Finance,* Chapter VIII.

[8] Canon 534 § 1 defines the powers extended to Religious Superiors in matters of alienation.

Furthermore, " in the case of alienation of divisible goods, the request for permission or consent must state what portions have been previously alienated; otherwise the permission is invalid." [9]

III. Money in Relation to Alienation

A. different types of capital

Ordinarily, money is viewed as a means of exchange and, as such, is considered a perishable thing, not susceptible of continued use. In this sense it is viewed as UNSTABLE, FREE or FLUCTUATING CAPITAL. At the present time, however, money is very frequently invested in profit-returning enterprises and as a result becomes working or lucrative capital, which is generally designated as STABLE, INVESTED or FIXED CAPITAL.

Stable, invested or fixed capital is, in consequence, that money which is not employed primarily as a medium of barter or exchange; but which has been invested in property or holdings of some kind, such as investments in bonds, stocks, mortgages and the like. In view of the primary purpose of money, the law of the Church views capital as becoming stable, invested or fixed only when designated so, either explicitly or implicitly, by some externally manifested act of a competent ecclesiastical authority, when acting in conformity with canonical legislation. Hence, for example, if the annual surplus of a parish has been profitably deposited or even invested in readily-negotiable securities, by a Bishop or a pastor in view of some future need, such surplus does not necessarily and automatically become a part of the stable, invested or fixed capital.[10]

[9] Can. 1532 § 4. Canon 534 § 2 contains a similar provision, applying to Religious, which states that " in the petition for permission to contract debts or obligations, the other debts or obligations with which the corporate entity, the Institute, the province, or house is, up to that day, burdened, must be expressed; otherwise, the permission obtained is invalid."

[10] Schmalzgrueber, III, 13, 50; Reiffenstuel, III, 13, 15. Cf. S. C. Prop. Fide, 16 Aprilis 1922, *Epistola,* Append., n. 49, AAS. XIV (1922), 281, 307.

When money has been duly and properly invested, in the real sense of the term, or duly aggregated to the stable capital of an ecclesiastical corporation, it then becomes a part of the fixed capital. Thereafter, it is subject to all the canonical formalities governing alienation.[11]

B. CURRENT VALUE OF THIRTY THOUSAND LIRE OR FRANCS

1. *Gold Coin: The True Unit of Value*

In view of the principles enunciated in Canons 534 and 1532, the specific amount of thirty thousand lire or francs becomes a very important norm in all transactions in relation to alienation. Hence, certain points must be clarified to facilitate the application of the principles to practical cases.

The Code of Canon Law does not explicitly determine the standard of value to be adopted in monetary computations. It is generally recognized, however, that gold coin in the true and accepted unit of value, in contradistinction to paper or other currencies. This principle is affirmed in a decision of the Sacred Roman Rota of February 27, 1930, wherein gold is recognized as the true standard of value.[12]

The same principle is enunciated with admirable clearness and brevity in the Letter of the Sacred Congregation of Religious, promulgated to the local Ordinaries and Religious Superiors of the United States by the Apostolic Delegate on November 13, 1936:—"The aforesaid sum of six thousand dollars should be understood, in connection with the terms of the Code, as equivalent to 'thirty thousand lire or francs' and in reference to the value of currency based upon gold in distinction to other currencies, gold coin being the true unit of value. In this connection the value is based upon such stable gold content and rate of exchange." [13]

[11] S. C. Prop. Fide, *Epistola,* 16 Aprilis 1922, Appendix, n. XVI, AAS. XIV (1922), 307.

[12] *S. R. Rotae Dec.* XXII (1930), 124.

[13] Letter, Nov. 13, 1936, II, p. 2.

The authors writing on this subject, endorse the same principle.[14] Hence, it can be deduced that gold is the true standard of value in computation of the sums stated in Canons 534 and 1532.

2. *The Present-Day Equivalent of Thirty Thousand Lire or Francs*

At the time of the promulgation of the Code, the sum of thirty thousand lire or francs was computed to be equivalent to six thousand dollars in United States currency. This ratio continued until January 31, 1934, when President Roosevelt, by a Presidential Proclamation, reduced the gold weight of the dollar, making the gold value only 59.06 per cent of the par established in 1900. In view of this substantial and factitious devaluation, one dollar and sixty-nine cents of the devaluated dollar is the present equivalent of the former gold dollar.

From this it can be deduced that the six thousand gold dollars of 1900-1934 are now approximately equivalent to ten thousand one hundred and fifty-nine devaluated dollars. Consequently, the thirty thousand lire or francs of Canons 534 and 1532 can safely be considered as equivalent to this amount. Bishops, Pastors, Religious Superiors and others may thus make present-day computations accordingly in practical cases.[15] In conformity with this same principle, the ten thousand dollars designated in the Quinquennial Faculties of the local Ordinaries of the United States may be considered as gold dollars and hence equivalent, at present, to approxi-

[14] Jorio, *Le Vergini Prudenti*, p. 68, nota 1; Cappello, *De Censuris*, n. 408, p. 356; Chelodi, *Jus de Personis*, n. 261, p. 405, nota 3; Vermeersch-Creusen, *Epitome*, I, n. 657, p. 474; Coronata, *Institutiones*, I, n. 560, p. 677, nota 4; Wernz-Vidal, *Jus Canonicum*, IV, n. 762, p. 230; De Meester, *Compendium*, III, n. 1487, p. 406; Berutti, *Institutiones*, III, p. 120; Schäfer, *De Religiosis*, n. 204, p. 244; Goyeneche, *Juris Canonici Summa Principia*, II, n. 36, p. 69; Ellis, "Triginta millia libellarum seu francorum, *Periodica*, XXVII (1938), 348-353.

[15] One of the best articles appearing on this subject was published by Reverend Adam C. Ellis, S.J.: "Triginta millia libellarum seu francorum," *Periodica*, XXVII (1938), 348-353.

mately sixteen thousand nine hundred and thirty-one devaluated dollars.

IV. Application of the Principle of Alienation to Practical Cases

With the foregoing as a background, we can proceed to examine certain types of practical cases in relation to the permissions necessary for alienation. Our principal concern will be the study of a few cases in relation to permissions from the Holy See, as these involve important sums and merit the greatest consideration.[16]

A. Different cases involving stable or unstable capital

1. Permission for alienation is ordinarily reserved to the Holy See, whenever the stable or fixed capital is involved in the following cases:

   a. Money and investments (over $6,000, gold) that have become a part of the stable or fixed capital of any ecclesiastical corporation.

Vromant: "Pecunia numerata quae summae capitali seu sorti stabili frugiferae legitime est adiuncta, formalitatibus alienationis subicitur." [17]

   b. Money or its equivalent, such as stocks, bonds, banknotes and the like, (over $6,000, gold), received from the sale of property belonging to the stable or fixed capital of an ecclesiastical corporation.[18]

   c. Money or securities (over $6,000, gold) received in the form of annuities contingent upon the payment of certain annual sums.[19]

[16] The principles enunciated here apply to ordinary cases in normal times. For the detailed treatment of the proper procedure in cases of emergency, cf. *Practical Problems in Church Finance,* Chapter XI.

[17] *De Bonis Ecclesiae Temporalibus,* (Louvain, 1927), n. 281, 3 c, p. 298. Cf. S.C. de Prop. Fide, AAS. XIV (1922), p. 281, q. 49; p. 307, XIV.

[18] Can. 1531 § 3.

[19] "The Sacred Congregation calls special attention to two systems of collecting funds or money which have become more widespread in this country

2. PERMISSION FOR ALIENATION IS NOT RESERVED TO THE HOLY SEE WHENEVER THE UNSTABLE OR FREE CAPITAL IS INVOLVED IN THE FOLLOWING CASES:

a. MONEY EMPLOYED TO TAKE CARE OF CURRENT EXPENSES.

Schmalzgrueber: . . . "et non datur aut accipitur, ut conservetur sed ut in alios, sc. QUOTIDIANOS USUS convertatur. . ." [20]

b. MONEY BORROWED ON SHORT-TERM LOANS PROVIDED NO CONTRACTUAL OBLIGATIONS ARE ASSUMED BY THE ECCLESIASTICAL CORPORATION.

Larraona: "Obligationes huiusmodi simplices, i. e. absque alienatione, quoad plura alienationibus aequiparantur et sensu lato alienationes dici possunt et non raro dicuntur, tamen nec sunt proprie dictae alienationes, nec nomine alienationis

in recent years. These two systems are (1) the issuance of bonds or debentures upon ecclesiastical property and the sale of such bonds or debentures in the public market or to private investors, and (2) the system of soliciting or accepting funds under the so-called annuity agreement providing for payments of an annuity to the donor for life. *Both of these systems of obtaining money fall within the provisions of canon 534.* For under both systems the moral religious person, who issues the bonds or debentures or accepts the funds under an annuity agreement, undertakes economic obligations which must be met at a certain time. Consequently both the issuance of bonds or debentures and the acceptance of annuities are governed by the provisions of canon 534. The conclusion is clear that any attempt by a religious province or religious house, to issue bonds or debentures or to accept annuities involving a sum exceeding six thousand dollars would be both *unlawful and invalid* if made without a papal indult. This is true in all cases where the sums of money accruing from one or both systems or from the combination of several operations either at the same time or at different times accumulate in a sum greater than the sum of six thousand dollars. . . .

In order to avoid the serious inconveniences and evils when religious institutes imprudently contract obligations under annuity agreements and later are not in a position to satisfy the annuity requirements, it is strictly and formally forbidden to use all or any part of the capital annuity fund which should remain intact as long as the annuitant is living."

Letter of the S. Congregation for Religious, promulgated under the authority of the Apostolic Delegate, November 13, 1936, nn. I, V.

[20] III, 13, 50. Cf. Reiffenstuel, III, 13, 15; Vermeersch, *Periodica,* VI (1912), 20.

veniunt, non solum in poenalibus, sed nec in aliis ad quae aequiparatio ex lege non extendatur." [21]

C. MONEY BORROWED ON SHORT-TERM LOANS FOR ORDINARY AND NECESSARY EXPENSES, EVEN THOUGH A SMALL RATE OF INTEREST IS PAID.

Vromant: "Actus nonnulli qui aliquando specietenus, revera autem alienationes non sunt: Pecunia mutuo acceptata, etiam cum fenoris moderati stipulatione." [22]

B. INVESTMENTS

INVESTMENTS OF THE FOLLOWING NATURE ARE NOT CONSIDERED AS RESTRICTED TO THE SPECIAL PERMISSION OF THE HOLY SEE:

1. MONEY PLACED IN SAFE INVESTMENTS, SUCH AS STOCKS, BONDS AND THE LIKE, UNTIL SUCH TIMES AS AUSPICIOUS OPPORTUNITIES OR SUFFICIENT SUMS WARRANT THE CONSTRUCTION OF ECCLESIASTICAL EDIFICES.

Vermeersch: "Denique, ipsa declarationis vis (S. C. Concilii, 17 Febr. 1906, *Romana et aliarum*) nobis videtur apte temperanda et circumscribenda istis titulis in quibus re vera facta est CAPITALIS ecclesiastici collocatio. Et re quidem vera, ut hodie sunt mores, prudens et sollers administrator iam solet in paucos menses pecunias collocare, quarum tamen liberam habet dispositionem. Si, itaque, tituli mere huiusmodi

[21] *Commentarium pro Religiosis,* XIII, (1932) 190.

[22] *De Bonis Ecclesiae Temporalibus,* n. 280, n. 2, p. 296. Cf. Vermeersch-Creusen, *Epitome,* II, n. 860, p. 534. A case in point would be that of a university or college borrowing money without putting up collateral, to defray ordinary and necessary expenses during the summer months, in expectancy of tuition money to be paid later on. Such short-term loans would be allowed only under the following conditions:—1. The short-term loans to be for ordinary expenses, necessary repairs and the like; 2. There must be moral certainty that the money will be forthcoming within a relatively short time. When these provisions are duly observed, the short-term loans would not be in contravention of the rulings of Canon 534: *vel de contrahendis debitis;* or of Canon 1538: *vel agatur de aere alieno contrahendo.*

A similar case would be that of a parish borrowing money, as a short-term loan, under similar conditions, for a special emergency.

pecunias repraesentant, aeque bene poterunt alienari et permutari sicut ipsae pecuniae. Nec aliter respondendum nobis videtur SI QUIS PECUNIAS QUAERENS ALICUI AEDIFICATIONI, INTEREA, DONEC PERFICIATUR SUMMA, PECUNIAS ISTIUSMODI FRUCTUOSE COLLOCAVERIT. CUM OPPORTUNITAS AEDIFICATIONI HABEBITUR, LICEBIT IPSI TITULOS ISTOS VENDERE ET IN BONUM IMMOBILE COMMUTARE. Perinde dixeris de variis casibus huiusmodi." [23]

2. MONEY INVESTED IN STOCKS, BONDS, BANK-NOTES, AND THE LIKE MAY BE TRANSFERRED TO OTHER STOCKS, BONDS, BANK-NOTES AND SIMILAR INVESTMENTS THAT ARE EQUALLY SAFE AND LUCRATIVE.

This is clear from Canon 1539 § 2 which states: "Administrators may exchange notes payable to bearer for other notes which are more valuable or at least equally safe and profitable, avoiding however every kind of barter or trading. For this the consent of the Ordinary is necessary, as well as that of the board of administration and of the other interested parties."

3. MONEY INVESTED IN STOCKS, BONDS, BANK-NOTES, MORTGAGES AND THE LIKE MAY BE WITHDRAWN AND CHANGED TO SAFER INVESTMENTS, EVEN THOUGH THE INTEREST RETURNS ARE NOT SO LUCRATIVE.

Ferraris: "In casu autem, quo capitale census fuerit restitutum, tunc si pro investitione non inveniatur fundus tot reddens redditus, quot reddebat primus, ut si v. g. primus fundus reddebat quinque pro centum, et nunc, non invenitur nisi fundus qui reddat quatuor, tunc valide, et licite fieri potest investitio pro minori redditu, cum res tanti valeat, quanti potest. . . . Sic pariter valide, et licita est investitio pro minori redditu in fundo securo, relicta investitione pro majori redditu in fundo periculoso; nam sic utilius geruntur res Ecclesiae, cum plus valeant quatuor, v. g. certa, quam quinque, vel sex periculosa." [24]

[23] *Periodica*, II, p. 75.

[24] v. *Alienatio*, Vol. I, Art. IV, nn. 23-24. Cf. Schmalzgrueber, III, 13, 58, 66.

C. MORTGAGES, DEBTS AND LEASES

Canon 1533 states that "the formalities of law required by Canons 1530-1532 are necessary not only in alienation strictly so-called, but also for any contract whatsoever whereby the status of the Church may become less secure". HENCE, THE PERMISSION OF THE HOLY SEE IS NECESSARY IN THE FOLLOWING TRANSACTIONS:

1. MORTGAGES BEYOND THE SUM OF $6,000 (GOLD) [25]
2. DEBTS CONTRACTED BEYOND THE SUM OF $6,000 (GOLD) [26]
3. LEASE OR RENTAL OF ECCLESIASTICAL PROPERTY AT MORE THAN $6,000 (GOLD) PER ANNUM AND EXTENDING BEYOND A PERIOD OF NINE YEARS [27]

CONCLUSION

The few examples offered in the foregoing pages give but the slightest indication of the manifold problems that present themselves in the financial transactions of ecclesiastical institutions and corporations. New and baffling difficulties constantly arise. This renders imperative a more profound study of basic principles in order to arrive at correct solutions. The enactments of the Code and the general principles of ecclesiastical jurisprudence usually provide adequate and sure guides in practical cases, when studied with conscientious carefulness and scholarly thoroughness.

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[25] By mortgage here is meant the *hypotheca specialis,* rather than what is known as the *hypotheca generalis.* Vromant, *De Bonis Ecclesiae Temporalibus,* n. 329 2, b, c, d, p. 343; Reiffenstuel, III, 21, 12; Schmalzgrueber, III, 21, 2-9; Bastien, *Directoire Canonique,* n. 365, p. 245; Vermeersch-Creusen, *Epitome,* II, n. 859, p. 533; Coronata, *Institutiones,* II, n. 1075, p. 492.

[26] Can. 1538 § 1. The term debt is to be understood in the sense of a real obligation, in virtue of which the property of the ecclesiastical corporation would actually be jeopardized. Vermeersch-Creusen, *Epitome,* II, n. 860, p. 534; Vromant, *De Bonis Ecclesiae Temporalibus,* n. 296, p. 312; Ojetti *Synopsis,* n. 593, p. 417.

[27] Can. 1541 § 2, 1°. It is to be noted that the rental rate, i.e. *valor locationis,* refers to the annual sum paid by the lessee and not to the value of the property leased. Vermeersch-Creusen, *Epitome,* n. 862, p. 536; Vromant, *De Bonis Ecclesiae Temporalibus,* n. 338, p. 350, nota 2.

IUS CLAVIUM IUXTA SANCTUM THOMAM

INVESTIGATIO in mentem Sancti Thomae quoad iurisdictionem confessarii sese dividit satis logice in tres partes: 1) de necessitate iurisdictionis; 2) de natura iurisdictionis; 3) de eius limitatione et extensione relata ad causas. Comparationis causa iuvat citare doctrinam Concilii Tridentini, in capite "De casuum reservatione", quae sonat ut sequitur.[1]

"Quoniam igitur natura et ratio iudicii illud exposcit, ut sententia in subditos dumtaxat feratur, persuasum semper in Ecclesia Dei fuit et verissimum esse Synodus haec confirmat, nullius momenti absolutionem eam esse debere, quam sacerdos in eum profert, in quem ordinariam aut subdelegatam non habet iurisdictionem. Magnopere vero ad christiani populi disciplinam pertinere sanctissimis Patribus nostris visum est, ut atrociora quaedam et graviora crimina non a quibusvis, sed a summis dumtaxat sacerdotibus absolverentur. Unde

[1] Tamquam norma scrutinii in hac re placet sequi ordinem Concilii Tridentini (Sess. XIV, c. 7)—Denzinger, H. et al., *Enchiridion Symbolorum* (ed. 21-23, Friburgi Brisgoviae: 1937). Cf. Mansi, J., et al., *Sacrorum Conciliorum Nova et Amplissima Collectio,* (53 vols., Parisiis, 1901-1927), XXXIII, 96.

In c. 6 huius sessionis Concilium declaravit tantummodo episcopos et sacerdotes esse ministros Sacramenti Poenitentiae, illos valide absolvere etiamsi sint indigni, demumque absolutionem sacramentalem non esse merum ministerium declarandi remissa esse peccata, sed constitutam esse ad instar actus iudicialis, quo a ministro veluti a iudice sententia profertur—Denzinger, *op. cit.,* 902.

Concilium noluit instituere tractatum completum hac de re, sed solum declaravit doctrinam necessariam et sufficientem ad confutandos errores Protestantium et ad reformationem abusuum. Nec Sanctus Thomas completum tractatum perfecit quia morte praeventus non inclusit thesim in eius Summa Theologiae. Quod tamen scripsit in Commentario super Sententias invenitur systematice dispositum et quasi verbatim in Supplemento Tertiae Partis Summae. Adhibendus est in hac investigatione textus Supplementi utpote editus a Commissione Leonina et insuper in se probabiliter antiquior textui traditionali Commentarii super Sententias. Cf. *Sancti Thomae Aquinatis Opera Omnia,* iussu impensaque Leonis XIII P.M. (Romae: 1916) XII; *speciatim* Praefatio in Supplementum Tertiae Partis Summae Theologiae, p. I.

merito Pontifices Maximi, pro suprema potestate sibi in Ecclesia universa tradita, causas aliquas criminum graviores suo potuerunt peculiari iudicio reservare. Neque dubitandum esset, quando omnia, quae a Deo sunt, ordinata sunt, quin hoc idem episcopis omnibus in sua cuique dioecesi, *in aedificationem* tamen, *non in destructionem* (2 Cor. 13, 10) liceat pro illis in subditos tradita supra reliquos inferiores sacerdotes auctoritate, praesertim quoad illa, quibus excommunicationis censura annexa est. Hanc autem delictorum reservationem consonum est divinae auctoritati non tantum in externa politia, sed etiam coram Deo vim habere. Verumtamen pie admodum, ne hac ipsa occasione aliquis pereat, in eadem Ecclesia Dei custoditum semper fuit, ut nulla sit reservatio in articulo mortis, atque ideo omnes sacerdotes quoslibet poenitentes a quibusvis peccatis et censuris absolvere possunt; extra quem articulum sacerdotes cum nihil possint in casibus reservatis, id unum poenitentibus persuadere nitantur, ut ad superiores et legitimos iudices pro beneficio absolutionis accedant."

I: Necessitas iurisdictionis in ministro Sacramenti Poenitentiae

Iurisdictio ecclesiastica in communi est " potestas moralis, regendi subditos in rebus ad finem supernaturalem spectantibus, seu in ordine ad sanctitatem et vitam aeternam." [2] Vocatur etiam potestas regiminis, vel potestas regendi. Supponimus nunc divinam originem talis potestatis in Ecclesia probatam esse in Tractatu de Ecclesia.[3] Hoc loco sufficient divisiones iurisdictionis allatae in Codice Iuris Canonici. " Potestas iurisdictionis seu regiminis quae ex divina institutione est in Ecclesia, alia est fori externi, alia fori interni, seu conscientiae, sive sacramentalis sive extra-sacramentalis." [4]

[2] Merkelbach Benedictus, O.P., *Summa Theologiae Moralis,* (Parisiis), III, p. 523, n. 569.

[3] Conc. Trident. Sess. XIV, cc. 1, 3. Cf. Saltier, P., *De Poenitentia* (Paris: 1923), 89 sqq.; 234 sqq.

[4] Canon 196.

"Potestas iurisdictionis ordinaria ea est quae ipso iure adnexa est officio; delegata quae commissa est personae." [5] Aliae divisiones patebunt in cursu huius investigationis.

a) *Factum:* Iurisdictio requiritur et quidem ad valorem absolutionis.

Necessitas iurisdictionis in ministro Sacramenti Poenitentiae exprimitur vehementer a Concilio Tridentino sequentibus verbis: "persuasum semper in Ecclesia Dei fuit et verissimum esse Synodus haec confirmat, *nullius momenti* absolutionem eam esse debere, quam sacerdos in eum profert, in quem ordinariam aut subdelegatam non habet iurisdictionem."

Certo certius expressio "nullius momenti" satis indicat iurisdictionem esse necessariam ad validitatem actus. Attamen propter errores Synodi Pistoriensis, Pius Papa VI postea, anno 1794, expresse declaravit: "Doctrina Synodi . . . quatenus post institutas dioeceses et parochias enuntiat tantummodo conveniens esse ad praecavendum confusionem ut absolvendi potestas exerceatur super subditos; sic intellecta, tanquam ad validum usum huius potestatis non sit necessaria ordinaria, vel subdelegata illa iurisdictio, sine qua Tridentinum declarat, nullius momenti esse absolutionem a sacerdote prolatam:—falsa, temeraria, perniciosa, Tridentino contraria et iniuriosa, erronea." [6]

Codex Iuris Canonici, qui sequitur fidelissime Concilium Tridentinum [7] in his materiis, concise exprimit eamdem doc-

[5] Canon 197, 1.

[6] Const. "*Auctorem Fidei*", 28 Aug. 1794, prop. 37, Synodi Pistorien., damn. —Denzinger, *op. cit.*, n. 1537.

[7] Modo disciplinari disserens de eadem re, Concilium Tridentinum in sessione vigesima tertia, anno 1563, confirmat eamdem necessitatem iurisdictionis his verbis: "Quamvis presbyteri in sua ordinatione a peccatis absolvendi potestatem accipiant, decernit tamen sacrocancta synodus, nullum etiam regularem, posse confessiones saecularium, etiam sacerdotum audire, nec ad id idoneum reputari, nisi aut parochiale beneficium, aut ab episcopis per examen si illis videbitur esse necessarium, aut alias idoneus iudicetur et approbationem, quae gratis datur, obtineat; privilegiis et consuetudine quacumque etiam immemorabili, non obstantibus" (Mansi, *op. cit.*, XXXIII, 145). Notanda sunt verba "confessiones saecularium" quia superior maior ordinis clericalis exempti potest concedere iurisdictionem pro subditis suis, novitiis, et familiaribus.

trinam: "Praeter potestatem ordinis, ad validam peccatorum absolutionem requiritur in ministro potestas iurisdictionis, sive ordinaria sive delegata, in poenitentem." [8]

Quaerimus nunc, utrum doctrina tradita a Sancto Thoma in saeculo decimo tertio concordet cum definitionibus Concilii Tridentini? Responsio est affirmativa, nam haec scripsit Sanctus Doctor in Commentario Super Sententias: ". . . et ideo de *necessitate* huius sacramenti est non solum ut minister habeat ordinem, sicut in aliis sacramentis, sed etiam quod habeat iurisdictionem. Et, sicut ille qui non est sacerdos non potest hoc sacramentum conferre, ita nec ille qui non habet iurisdictionem." [9] Ex his verbis satis constat Divum Thomam tenuisse iurisdictionem necessariam esse ad validitatem absolutionis et non tantum ad liceitatem, nam aequiparat sacerdotem carentem iurisdictione, personae quae non est sacerdos.

Item in Distinctione sequenti: "Ad primum ergo dicendum, quod ad absolutionem a peccato requiritur duplex potestas; scilicet potestas ordinis et potestas iurisdictionis." [10]

Sed quid de peccatis venialibus? Utrum iurisdictio requiratur pro absolutione eorum? Concilium Tridentinum nihil dicit de hac quaestione. Attamen Concilium declarat necessitatem iurisdictionis pro absolutione peccatorum in genere, et non facit exceptionem pro peccatis venialibus. Sanctus Thomas vero, cum aliis theologis antiquis excipit peccatum veniale a communi necessitate iurisdictionis. Audiamus eius verba: "Et tamen etiam in foro confessionis aliquis non potest seipsum absolvere; nec superiorem aut aequalem nisi ex commissione sibi facta. De venialibus autem potest; quia venialia ex quibuslibet sacramentis gratiam conferentibus remittuntur; unde remissio venialium *sequitur potestatem ordinis.*" [11] Unde quilibet presbyter vi characteris sacerdotalis, vi potestatis ordinis potest remittere peccata venialia

[8] Canon 872.

[9] Suppl., q. 8, a. 4. (IV Sent., d. 17, q. 3, a. 3, qua 4).

[10] Suppl., q. 20, a. 1, ad 1 (IV Sent., d. 19, q. 1, a. 3, qua 1, ad 1).

[11] Suppl., q. 22, a. 4, ad 3 (IV Sent., d. 18, a. 2, a. 3, qua 1, ad 3).

quarumlibet personarum. Potestas iurisdictionis ergo non requiritur.

Caietanus aliquatenus mutavit sententiam magistri sui. Ille non negat necessitatem iurisdictionis pro peccatis venialibus, sed putat simplicem sacerdotem illam habere ipso iure, propter parvitatem materiae. "Ad secundum dicitur, quod quia peccata venialia quilibet est liber respectu sacramenti poenitentiae eo quod nullus tenetur confiteri venialia; ideo satis rationabile est quod quilibet potest se subdere cui vult sacerdoti pro sacramento poenitentiae venialium. Et sic invenitur hic non sola potestas ordinis, sed potestas iuridictionis reductive. . . . Si nullo modo iurisdictio interveniet, nullum esset sacramentum." [12]

"Recentius vero," testante Darmanin, "sententia docens quemlibet sacerdotem potestatem absolvendi a venialibus vi et in actu ipsius ordinationis iure divino, accipere, ideoque iurisdictione ecclesiastica minime ad hoc indigere fere ab omnibus auctoribus fuit reiecta atque deserta, utpote erronea et falsa." [13] Secundum Merkelbach, "Iurisdictio etiam requiritur ad absolvendum a peccatis venialibus, quidquid aliqui olim dixerint. Quod iam omnino certum est ex canone 872 simul cum canone 874." [14] Revera absolutio venialium sine iurisdictione certe est illicita ex decreto Sacrae Congregationis Concilii anno 1679 in quo dicitur: "Non permittant [episcopi et parochi] ut venialium confessio fiat simplici sacerdoti non approbato ab episcopo aut Ordinario." [15] Videtur invalida propter rationes allatas a Concilio Tridentino et ab ipso Divo Thoma ad probandam necessitatem iurisdictionis pro absolutione peccatorum in genere, et propter silentium Concilii et

[12] Thomas De Vio Caietanus, *Quaestiones de Sacramentis Summam Theologiae Sancti Thomae complentes.* (*Opera Omnia S. Thomae*, Edit. Leon., XII, p. 358).

[13] Darmanin A, O.P., "De Reservatione Peccatorum", *Angelicum*, V (1928), 55-70, 213-241, 539-554, praesertim, p. 545.

[14] Merkelbach, *op. cit.* III, p. 532, n. 5783.

[15] Denzinger, *op. cit.* n. 1150.

Codicis qui nullam faciunt exceptionem pro peccatis venialibus.[16]

b) *Ratio Necessitatis.*

Ad probandam necessitatem iurisdictionis Tridentinum quasi per transennam affert rationem traditionis dicens: " persuasum semper in Ecclesia Dei fuit ". Ratio intrinseca desumitur ex ipsa natura sacramenti poenitentiae. In capite sexto Concilium declarat absolutionem sacramentalem esse ad instar actus iudicialis, et in canone parallelo anathematizat eos qui hoc negabant.[17] In capite septimo ulterius procedens, ex natura actus iudicialis deducit necessitatem iurisdictionis in ministro absolutionis. " Quoniam igitur natura et ratio iudicii illud exposcit, ut sententia in subditos dumtaxat feratur, persuasum semper in Ecclesia Dei fuit et verissimum esse Synodus haec confirmat, nullius momenti absolutionem eam esse debere, quam sacerdos in eum profert, in quem . . . non habet iurisdictionem." Sic sacerdos rite ordinatus est revera iudex, sed uti iudex civilis cui nondum assignantur subditi, vel uti ille qui habet iurisdictionem in uno loco sed non in alio. Et sicut sententia iudicis approbati tantummodo pro Italia invalida esset si ederetur in Statibus Foederatis Americae, ita absolutio sacerdotis in poenitentem in quem non habet iurisdictionem, " nullius momenti " est sicut dicit Concilium Tridentinum.

Expressius quam Concilium Sanctus Thomas probat necessitatem iurisdictionis ex traditione, adducens decretum Innocentii III in Concilio Lateranensi IV, quod citat quoad sensum, nempe " Quod omnes utriusque sexus, semel in anno proprio sacerdoti confiteantur." [18] Proprius sacerdos de quo est sermo in

[16] Qui plura cupit potest videre dissertationem Patris Darmanin in *Angelicum* vel etiam Cappello Felix, S.I., *Tractatus Canonicus-Moralis de Sacramentis.* II, pars I, *de Poenitentia,* p. 282, n. 357 sq. Sufficiat notare nullam positivam discrepantiam adesse inter doctrinam Tridentini et Sancti Thomae de hac re nam Concilium noluit solvere quaestionem. Discrepant tamen doctrina Sancti Thomae et sententiae theologorum et canonistarum modernorum.

[17] Denzinger, *op. cit.* n. 919.

[18] Suppl., q. 8, a. 4. (IV Sent., d. 17, q. 3, a. 3, qua 4) Cf. Denzinger, n. 437.

illo decreto et in alia legislatione antiqua est parochus primo et per se, quamvis nomen extenditur ad omnes illos qui habent iurisdictionem vi muneris sui in talem vel talem personam. Sic proprius sacerdos militis esset capellanus militaris, et superiori iure Epsicopus Castrensis et Summus Pontifex, nam omnes illi habent iurisdictionem ordinariam erga eum.

Eadem ratio intrinseca sumpta ex natura iudicii invenitur et in Tridentino et in scriptis Divi Thomae sed aliter et aliter formulata. Ad intellegendum argumentum ut propositum a Sancto Thoma oportet notare absolutionem esse actum clavium regni coelorum, quae traditae fuerunt Apostolis et speciali modo Sancto Petro a Christo Domino.[19] Secundum definitionem Petri Lombardi "Claves istae sunt non corporales, sed spirituales; scilicet discernendi scientia et potentia iudicandi, id est ligandi, et solvendi, qua dignos recipere, indignos debet excludere a regno ecclesiasticus iudex." [20] Haec receptio dignorum et reiectio indignorum fit praecipue per Sacramentum Poenitentiae, in quo "ecclesiasticus iudex", seu sacerdos, absolvit vel non absolvit peccata, et infligit poenas debitas. Sanctus Thomas in Commentario super Sententias suam facit definitionem Lombardi et eam ulterius explicat dicendo: "character et potestas conficiendi [Sacramenta], et potestas clavium est unum et idem per essentiam, sed differt ratione." [21]

Multoties Sanctus Thomas repetit eumdem conceptum, sed nobis sufficiant ea quae habentur in tribus locis Commentarii super Sententias. In explicatione definitionis Magistri Sententiarum, sic formulat argumentum pro necessitate iurisdictionis: "Ad secundum dicendum quod omnis potestas spiritualis datur cum aliqua consecratione. Et ideo clavis cum ordine datur. Sed executio clavis indiget *materia debita*, quae est plebs subdita per iurisdictionem. Et ideo, antequam iurisdictionem habeat, habet claves, sed non habet actum cla-

[19] Matt. 16, 19.

[20] *IV Liber Sententiarum*, d. 18, (in *Opera Omnia Divi Thomae Aq.*, XII, [Venetiis: 1730], p. 436).

[21] Suppl., q. 17, a. 2, ad 1 (IV Sent., d. 18, a. 1, a. 1, qua 2, ad 1).

vium. Et quia clavis per actum definitur, ideo in definitione clavis ponitur aliquid ad iurisdictionem pertinens." [22]

Paulo infra magis concrete scribit: "Ad secundum dicendum quod etiam clavis materialis non potest aperire nisi seram propriam; nec aliqua virtus activa potest agere nisi in propriam materiam. Materia autem propria potestatis ordinis efficitur aliquis per iurisdictionem. Et ideo non potest aliquis clave uti in eum in quem iurisdictio non datur." [23]

Adhuc in alio loco dicit: "Praeterea iudicium spirituale debet esse ordinatius quam temporale. Sed in iudicio temporali non debet quilibet iudex quemlibet iudicare. Ergo, cum usus clavium sit iudicium quoddam, non potest sacerdos sua clavi uti in quemlibet." [24] Aliis verbis absolutio sacerdotis in eum qui suus subditus non est, cadit in materiam indebitam, et igitur nullius momenti est.

II: Natura iurisdictionis in foro sacramentali

Quamvis Concilium Tridentinum non tradat definitionem iurisdictionis multa elementa affert ex quibus possumus cum clarissimo Billuart collegere definitionem. Conabimur, sat breviter, demonstrare et Tridentinum et Sanctum Thomam tenere illam ut veram. Iurisdictio est "potestas qua sacerdos, ut iudex, fert in alterum, tanquam in subditum, sententiam in foro conscientiae." [25]

a) est *potestas.*

In ipso capite septimo Concilium Tridentinum aequivalenter vocat iurisdictionem potestatem, nam declarat actum reservationis casuum, qui est actus iurisdictionis, actum potestatis traditae a Christo.

Sanctus Thomas expresse hoc dicit sequentibus verbis. "Ad primum ergo dicendum, quod ad absolutionem a peccato

[22] Suppl., q. 17, a. 2, ad 2 (IV Sent., d. 18, a. 1, a. 1, qua 2, ad 2).

[23] Suppl., q. 20, a. 1, ad 2 (IV Sent., d. 19, q. 1, a. 3, qua 1, ad 2).

[24] Suppl., q. 20, a. 1, *Sed Contra* (IV Sent., d. 19, q. 1, a. 3, *Sed Contra*).

[25] Billuart Carolus, *Summa Sancti Thomae,* IX, *de Poenitentia* etc. (Parisiis: 1886), p. 355.

requiritur duplex potestas; scilicet potestas ordinis et potestas iurisdictionis." [26]

b) qua *sacerdos*, id est character sacerdotalis praeexigitur.

Concilium Tridentinum anathematizat illos praecipue Protestantes qui volunt alios quam sacerdotes esse ministros Sacramenti Poenitentiae.[27] Unde solus sacerdos capax est iurisdictionis in talem vel talem personam in foro conscientiae.

Angelicus Doctor clare exprimit eamdem notionem: "et ideo, sicut ille qui non est sacerdos non potest hoc sacramentum conferre, ita nec ille qui non habet iurisdictionem". [28]

Nihilominus potest quis dubitare num Sanctus Thomas sibi contradicat. Nonne ille docet confessionem faciendam esse laico defectu sacerdotis? En eius verba: "Et ita etiam minister poenitentiae cui confessio est facienda ex officio, est sacerdos: sed in necessitate etiam laicus vicem sacerdotis supplet, ut ei confessio fieri possit." [29]

Ad hoc dicendum est Sanctum Thomam hic loqui de confessione non sicut nos in linguis modernis sumimus vocem "confessionem" pro toto Sacramento Poenitentiae, sed tantum ut est *pars* Sacramenti, uti semper ille loquitur formaliter, et sic confessio est illa pars Poenitentiae quae ponitur a poenitente. Hoc clarius patebit ex responsionibus *eiusdem* articuli. "Ad primum ergo dicendum quod in Sacramento Poenitentiae non solum est aliquid ex parte ministri, scilicet absolutio et satisfactionis iniunctio sed etiam aliquid ex parte ipsius qui suscipit sacramentum, quod est etiam de essentia sacramenti, sicut contritio et confessio. . . . Et ad plenitudinem sacramenti utrumque debet concurrere, quando possibile est. Sed quando necessitas imminet, debet facere poenitens quod ex parte sua est, scilicet conteri et confiteri cui potest; qui quamvis *sacramentum perficere* non possit, ut faciat id quod ex parte sacerdotis est, absolutionem scilicet, tamen de-

[26] Suppl., q. 20, a. 1, ad 1 (IV Sent., d. 19, q. 1, a. 3, qua 1, ad 1).

[27] Sess. XIV, c. 6; Sess. XIV, can. 10.

[28] Suppl., q. 8, a. 4 (IV Sent., d. 17, q. 3, a. 3, qua 4).

[29] Suppl. q. 8, a. 2 (IV Sent., d. 18, q. 3, qua 2).

fectum sacerdotis Summus Sacerdos supplet. Nihilominus confessio laico ex desiderio sacerdotis facta sacramentalis est quoddammodo, quamvis non sit sacramentum perfectum, quia deest id quod est ex parte sacerdotis."

Ulterius asserit in articulo tertio " ipsa confessio laico facta sacramentale quoddam est (quamvis non sit sacramentum perfectum) et ex *caritate* procedens; et talibus natum est veniale remitti, sicut per *tunsionem pectoris* et *aquam benedictam*." Ultima verba clara demonstrant Sanctum Thomam consulendo ministerium laicale cum actibus poenitentis, non loqui de Sacramento Poenitentiae et de absolutione, sed tantum de confessione, quae aequiparatur tunsioni pectoris et aliis sacramentalibus.

c) ut *iudex.*

Concilium Tridentinum declarat iurisdictionem esse necessariam praecise quia absolutio sacramentalis est actus iudicialis. Ille igitur qui ponit talem actum agit inquantum iudex. Codex haec notat: " meminerit sacerdos in audiendis confessionibus se iudicis pariter et medici personam sustinere." [30]

Ex praedictis satis constat de mente Aquinatis quoad hoc munus et sufficit notare eius defensionem definitionis clavium a Magistro traditae: " Et ideo in praedicta definitione clavis ponitur genus, scilicet potestas; et subiectum potestatis, scilicet iudex ecclesiasticus." [31]

d) fert in alterum tanquam in *subditum.*

Concilium Tridentinum declarat " nullius momenti absolutionem eam esse debere quam sacerdos in eum profert in quam non habet iurisdictionem." Nullitas non provenit ex defectu intentionis vel aliunde sed praecise ex hoc quod absolutio profertur in personam non subditam sacerdoti absolventi.

In responsione ad quaesitum utrum aliquis possit uti clavibus in suum superiorem Sanctus Thomas haec habet: " po-

[30] Canon 888.

[31] Suppl., q. 17, a. 2 (IV Sent., d. 18, q. 1, a. 1, qua 2).

testas clavium requirit pro materia aliquem subiectum".[32] Id est, requirit subditum ut patet ex titulo articuli praecedentis, "Utrum sacerdos possit semper suum subditum absolvere?"[33]

e) fert *sententiam.*

Paulo antea Concilium Tridentinum hoc declaravit: "absolutio . . . ad instar actus iudicialis, quo ab ipso velut a iudice sententia pronuntiatur".[34]

Sanctus Thomas in hoc videtur reliquisse sententiam Petri Lombardi ut suam exacte conformet doctrinae postea promulgandae a Concilio Tridentino. Magister Sententiarum tenuit Deum solum tollere peccata sed sacerdotes illa solvere sicut Apostoli solverunt Lazarum quem Christus prius vivificavit. En eius verba: "Sed aliter ipse solvit et ligat: aliter Ecclesia. Ipse enim per se tantum dimittit peccatum quia et animam mundat ab interiori macula, et a debito aeternae mortis solvit. Non autem hoc sacerdotibus concessit quibus tamen tribuit potestatem solvendi, et ligandi, idest *ostendendi* homines ligatos vel solutos. . . . Ita etiam Lazarum iam vivificatum obtulit discipulis solvendum. . . . Hi ergo [sacerdotes] peccata dimittunt vel retinent dum dimissa a Deo, vel retenta iudicant et ostendunt."[35]

Sanctus Thomas in Commentario suo in hunc locum, non longius recedens ab istius sensu, dicit: "Ad primum ergo dicendum quod sicut Magister dicit in littera sacerdotibus commissa est potestas remittendi peccata, non ut propria virtute remittant, quia hoc Dei est; sed ut operationem Dei remittentis ostendant tanquam ministri. Sed hoc contingit tribus modis. . . . Tertio modo, ut significat divinam operationem in remissionem culpae praesentem, et ad ipsam aliquid dispositive et instrumentaliter operentur. Et sic, secundum aliam opinionem, quae sustinetur communius, sacramenta novae

[32] Suppl., q. 20, a. 3 (IV Sent., d. 19, q. 1, a. 1, qua 3).

[33] Suppl., q. 20, prologus (IV Sent., d. 19, q. 1, a. 3, qua 2).

[34] Sess. XIV, c. 6.

[35] *IV L. Sent.*, d. 18 prope medium, p. 438.

legis emendationem ostendunt divinitus factam. Et hoc modo etiam sacerdos Novi Testamenti ostendit absolutos a culpa: quia proportionaliter oportet loqui de sacramentis et potestate ministrorum." [36]

Nondum ergo doctrina Sancti Thomae de causalitate sacramentorum perpolita et evoluta est sicut in Summa Theologiae, sed iam in iuventute sua apparet progressus relate ad sententiam Petri Lombardi. Nam secundum illum sacerdos revera dimittit peccata, non principaliter sed instrumentaliter nempe ut minister.

Sed multos post annos in Summa Theologiae Sanctus Doctor apertius recedit ab opinione Petri Lombardi: "Ad quintum dicendum quod ista expositio Ego te absolvo, idest, absolutum ostendo, quantum ad aliquid quidem vera est, non tamen est perfecta. Sacramenta enim novae legis non solum significant sed etiam *faciunt quod significant*. Unde sicut sacerdos, baptizando aliquem, ostendit hominem interius ablutum per verba et facta non solum significative, sed etiam effective; ita etiam cum dicit, Ego te absolvo, ostendit hominem absolutum non solum significative, sed etiam effective." [37] Unde in Sacramento Poenitentiae sacerdos non tantum declarat poenitentem esse absolutum sed ipse—ministerialiter sed effective—fert sententiam absolutionis.

f) in foro *conscientiae*.

Concilium Tridentinum in capite septimo agens de reservatione peccatorum declarat: "hanc autem delictorum reservationem consonum est divinae auctoritati non tantum in externa politia, sed etiam coram Deo vim habere." Sed forum Dei vocatur ordinarie forum conscientiae, et sic minister Sacramenti Poenitentiae iurisdictione suffultus fert sententiam vim habentem in foro conscientiae.

Nihil clarius petendum est quam haec verba Angelici Doctoris: "respondeo dicendum quod in foro conscientiae causa agitur inter hominem et Deum: in foro autem exterioris iudicii

[36] Suppl., q. 17, a. 1, ad 1 (IV Sent., d. 18, q. 1, a. 3, ad 1).

[37] III, q. 84, a. 3, ad 5.

causa agitur hominis ad hominem. Et ideo absolutio vel ligatio quae unum hominem obligat quoad Deum tantum pertinet ad forum poenitentiae." [38]

Definitio iurisdictionis secundum clarissimum Billuart, cuius explicatio nunc completa est, amplectitur tantummodo causas eius intrinsecas, sed ad notionem adaequatam habendam adiungere oportet causas extrinsecas, videlicet causam agentem et causam finalem.

g) causa finalis: *disciplina* populi Christiani.

Primo et per se Concilium Tridentinum declarat reservationem peccatorum esse "ad christiani populi disciplinam". Sed reservatio est actus potestatis iurisdictionis, unde specificat illam. Ergo et iurisdictio ordinatur ad disciplinam populi Christiani.

Breviter et clare Sanctus Thomas eumdem exprimit conceptum. "Iurisdictionis autem potestas non est commissa alicui homini in favorem suam, sed in utilitatem plebis et honorem Dei." [39]

h) causa agens: *auctoritas ecclesiastica.*

Sicut iam dictum est Concilium Tridentinum noluit definire iurisdictionem in capite septimo, et igitur ex professo de eius causa agente non loquitur. Attamen ille qui propter auctoritatem traditam sibi a Christo potest sibi reservare causas poenitentiales—sicut dictum est in hoc capite—potest etiam et propter eamdem rationem concedere iurisdictionem aliis. Nam potestas libere reservandi importat etiam potestatem libere concedendi.

Impossibile foret invenire testimonium expressius eiusdem veritatis quam illud Sancti Thomae: "electio discreti sacerdotis non est nobis commissa ut nostro arbitrio facienda, sed de licentia superioris." [40]

Magis adhuc determinans diversam iurisdictionem secundum eius originem, Concilium Tridentinum distinguit inter

[38] Suppl., q. 22, a. 1 (IV Sent., d. 18, q. 2, a. 2).

[39] Suppl., q. 8, a. 5, ad 1 (IV Sent., d. 17, q. 3, a. 3, qua 5, ad 1).

[40] Suppl., q. 8, a. 4, ad 3 (IV Sent., d. 17, q. 3, a. 3, qua 4, ad 3).

"ordinariam" et "subdelegatam" iurisdictionem. Hodie vero iurisprudentia ulterius distinguit et reservat vocem "subdelegata" pro infima specie iurisdictionis, nempe pro illa concessa a persona quae habet tantummodo iurisdictionem delegatam, non ordinariam. Sensus iuridicus horum terminorum determinatur in canone 197: "Potestas iurisdictionis ordinaria ea est quae ipso iure adnexa est officio; delegata quae commissa est personae."

Sanctus Thomas agnoscit hanc divisionem iurisdictionis sed loco vocis "delegare" adhibet vocem "committere alteri" quod in idem redit. In defensione iurium Ordinum Mendicantium haec habet Angelicus Doctor: "Non autem excluditur quin monachus possit accipere potestatem ordinariam, vel commissam. . . ." [41]

Notanda est discrepantia inter disciplinam Sancti Thomae et hodiernam. Aquinas habet ut principium saepius repetendum: "Quicumque autem iurisdictionem habet, potest ea quae sunt iurisdictionis committere" [seu delegare].[42] Parochus igitur potest delegare iurisdictionem ad confessiones excipiendas. Revera Concilium Lateranense IV (1215) in eodem saeculo Sancti Thomae testimonium reddit eidem disciplinae: "Si quis autem alieno sacerdoti voluerit iusta de causa sua confiteri peccata, licentiam prius postulet et obtineat a proprio sacerdote." [43]

Concilium Tridentinum vero et Codex noster aliter statuunt, nempe quod delegatio ad excipiendas confessiones saecularium etiam sacerdotum unice petenda est ab Ordinario.[44] Sed principium Sancti Thomae invenitur in Codice, cum aliqua restrictione: "Qui iurisdictionis potestatem habet ordinariam, potest eam alteri ex toto vel ex parte delegare, nisi aliud expresse iure caveatur." [45] In casu autem aliud nunc statuitur in iure, i.e., excipitur a generali regula potestas clavium.

[41] *Contra Impugnantes Dei Cultum et Religionem, Opusculum XVI* (Tom. XIX) (*Opera Omnia Divi Thomae Aq.*, XIX [Venetiis: 1787], p. 318).

[42] Suppl., q. 8, a. 5 (IV Sent., d. 17, q. 3, a. 3, qua 5).

[43] C. 12, X, *de poenitentiis et remissionibus*, V, 38; cf. Denzinger, n. 437.

[44] Sess. XXIII, *de ref.*, c. 15. Cf. Canonem 874.

[45] Canon 199.

Aliqui tamen voluerunt intellegere decretum Concilii Lateranensis supra allatum ita stricte ut Episcopi et Summi Pontifices non possent aliis concedere facultatem excipiendi confessiones parochianorum, imo nec ipsi excipere illas sine consensu et licentia parochorum. Ita Gulielmus de Sancto Amore quem vehementer inpugnavit Sanctus Thomas in opusculo *Contra Impugnantes Dei Cultum et Religionem.* Ad probandum Episcopos et superiores prelatos posse praedicare et absolvere eos qui sacerdotibus subduntur sine licentia ipsorum sacerdotum affert decem et septem argumenta. Ad ostendendum "quod aliqui ex commissione Episcoporum possunt praedicare et confessiones audire in parochiis sacerdotum" affert sex argumenta.[46] Etiam in Commentario super Sententias clare aperit mentem suam: "Ille qui habet indistinctam potestatem super omnes, potest uti clavibus in omnes."[47]

Iidem errores contra quos pugnavit Sanctus Thomas resuscitati sunt saeculo sequenti a Ioanne de Polliaco, et condemnati a Papa Ioanne XXII.[48]

III: Extensio et limitatio iurisdictionis relate ad causas

a) Reservatio casuum.

Sicut iurisdictio potest concedi vel minus a Superiore ecclesiastico ita potest extendi vel limitari, v. g., quoad personas, territorium, causas iudicandas. Nam qui potest plus, potest et minus. Sed Concilium Tridentinum in capite septimo loquitur tantummodo de limitatione quoad causas. Declarat Concilium Summos Pontifices pro universa Ecclesia et Episcopos pro propriis dioecesibus posse reservare suo peculiari iudicio quasdam causas graviores, et hoc ex potestate tradita illis a Christo Domino. En eius verba: "merito Pontifices Maximi, pro suprema potestate sibi in Ecclesia universa tra-

[46] *Contra Impugnantes Dei Cultum et Religionem,* pp. 312-314.

[47] Suppl., q. 20, a. 1 (IV Sent., d. 19, q. 1, a. 3, qua 1).

[48] Const. "*Vas Electionis,*" 21 iul. 1321—Denginger, n. 491-493.

dita, causas aliquas criminum graviores suo potuerunt peculiari iudicio reservare . . . hoc idem episcopis omnibus in sua cuique dioecesi . . . liceat."

Sententia Sancti Thomae non est longius quaerenda. Concise hoc scribit: " sed quia ad usum huius potestatis [ordinis] requiritur iurisdictio, quae a maioribus in inferiores descendit, ideo potest superior aliqua sibi reservare in quibus iudicium inferiori non committat." [49] Unde plane concordat Sanctus Doctor cum Concilio Tridentino de potestate reservandi, sed insuper addit rationem theologicam, nempe necessitatem iurisdictionis quae a superioribus profluit.

Ad complementum doctrinae de reservatione iuvabit notare aliquam discrepantiam inter disciplinam poenitentialem Sancti Thomae et illam quae nunc viget. Ante annum 1741 absolutio complicis in peccato turpi, iure communi erat valida et licita.[50] Ita dicit et Sanctus Thomas: " in tali casu nec sacerdos deberet audire confessionem mulieris cum qua peccavit de illo peccato, sed deberet ad alium mittere. . . . Si tamen absolveret, absoluta esset." [51]

Sed post Constitutionem *Sacramentum Poenitentiae* (1 Iun. 1741) Benedicti XIV absolutio talis est non tantum illicita sed invalida.[52] Codex noster haec habet: " Absolutio complicis in peccata turpi invalida est, praeterquam in mortis periculo; et etiam in periculo mortis, extra casum necessitatis, est ex parte confessarii illicita ad normam constitutionum apostolicarum et nominatim constitutionis Benedicti XIV *Sacramentum Poenitentiae*, 1 Iun. 1741." [53]

Concilium Tridentinum etiam declarat: " Hanc . . . delictorum reservationem consonum est divinae auctoritati non tantum in externa politia sed etiam coram Deo vim habere."

[49] Suppl., q. 20, a. 2 (IV Sent., d. 19, q. 1, a. 3, qua 2).

[50] Cappello *op. cit.*, II, p. 492, n. 639.

[51] Suppl., q. 20, a. 2, ad 1 (IV Sent., d. 19, q. 1, a. 3, qua 2, ad 1).

[52] Constitutio Benedicti PP. XIV: "*Sacramentum Poenitentiae*," 1 iun. 1741, Documentum V in Codice Iuris Canonici (ed. Vat.: 1933), p. 742. Cf. *Bened. XIV Bull.*, I, 50-54.

[53] Canon 884.

Sanctus Thomas aequivalenter idem docet, nempe quod Episcopi et Summus Pontifex possunt sibi reservare quaedam crimina [54] et revera agitur de foro conscientiae, in quo secundum illum "causa agitur inter hominem et Deum." [55] Unde reservatio de qua est sermo habet vim coram Deo.

b) Cessatio reservationis in *articulo mortis.*

Quoad reservationem in articulo mortis Concilium Tridentinum hoc statuit: "verumtamen pie admodum, ne hac ipsa occasione aliquis pereat, in eadem Ecclesia Dei custoditum semper fuit, ut nulla sit reservatio in articulo mortis, atque ideo omnes sacerdotes quoslibet poenitentes a quibusvis peccatis et censuris absolvere possunt." Notandum est pro praxi quod nunc lex aliquatenus diversa est. Nam loco "articulo" mortis, Codex adhibet expressionem "periculum mortis", [56] quod latius patet.

Etiam in hoc, i.e., quoad articulum mortis, Sanctus Thomas conformior est disciplinae sui temporis et Concilii Tridentini quam legis hodiernae. Scribit: "Ad primum ergo dicendum quod aliquis potest uti iurisdictione alterius ex eius voluntate: quia ea quae iurisdictionis sunt committi possunt. Unde, quia Ecclesia acceptat ut quilibet sacerdos absolvere possit in *articulo* mortis, ideo ex hoc ipso quis usum iurisdictionis habet, quamvis iurisdictione careat." [57]

En brevis comparatio doctrinae Aquinatis cum hodierna et mira concordia inter Sanctum Thomam saeculo decimo tertio scribentem, et Oecumenicum Concilium Tridentinum saeculo decimo sexto habitum. Sic sub alio adhuc aspectu eius catholicitas splendet. Sub qua ratione eum ducem agnoscere et canonistam non piget.

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[54] Suppl., q. 20, a. 2 (IV Sent., d. 19, q. 1, a. 3, qua 2).

[55] Suppl., q. 22, a. 1 (IV Sent., d. 18, q. 2, a. 2, qua 1).

[56] Canon 882.

[57] Suppl., q. 8, a. 6, ad 1 (IV Sent., d. 20, q. unica, a. 1, qua 2).

Digests

THE CANONICAL JURISTIC PERSONALITY

(Continuation of a Digest of Dissertation No. 39, Catholic University of America Canon Law Studies. Washington: Catholic University, 1927.)

II. Ecclesiastical Juristic Personality in the United States

The religious urge prompted the colonization of America but it was accompanied by intolerance. Religious tolerance was the rule only in Rhode Island, by Charter in 1663, and for a time in Carolina. But even in Rhode Island it was not until 1783 that Catholics received full political rights. In Pennsylvania the discriminatory statutes of 1730 were non-operative and so in practice Catholics enjoyed a degree of tolerance. In Maryland Queen Anne abrogated the law of Governor Seymour issued in 1704 forbidding public Catholic services; she permitted them in private homes. The Revolution taught the need of tolerance, even though a union of Church and State continued to exist in many of the States. Article VI of the first draft of the Constitution reads: "No religious test shall ever be required as a qualification to any office or public trust under the United States." The aim was to make impossible a Federal church, because the latter would be a disturbing factor in the relation of the various States, maintaining religious establishments, with the Federal Government and among themselves. Thus the first Congress proposed the following amendment, eventually adopted by the States: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

The States, however, are not bound by this amendment, but only Congress. Nor can such tolerance be claimed by communication of privilege under Article IV, section 2, which reads: "Citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." The Federal Supreme Court has so ruled in the Slaughter House Cases (16 Wallace 36 [U. S.]).

A State might therefore even now establish a religion, though it could possibly be restrained from confiscatory measures against dissenters by the Fourteenth Amendment, though all authors are not agreed upon this point.

However, State constitutional law is in harmony with Federal in conferring religious liberty within reasonable bounds, i.e., so far as not opposed to public policy, morality and good citizenship. The First Amendment of the Federal Constitution, for instance, can not be invoked to enjoin Congress from making religious polygamy a crime. Good citizenship is measured, generally speaking, by the fundamental moral principles and ethical tenets of Christianity. Federal legislation in the field of religion has been restricted to the inconsequential practice of providing chaplains for purposes of prayer in the two Houses of Congress, and for the military and naval forces of the government. All denominations enjoy equality of status under the Constitution of the United States.

That document, however, does not recognize the divine institution of the Catholic Church or its legal authority to create corporations which can exercise civil rights irrespective of government. Consequently, the Catholic Church is regarded as a hierarchy, not as a corporate entity. The same view is shared by the States. The Church as such can acquire temporal rights only through treaty with the Federal government. It was the acknowledgment by the United States of the Papal sovereignty in international law that influenced this country to recognize by the Treaty of Paris in 1898 the legal personality of the Church in those territorial acquisitions which were originally under Spanish dominion, Cuba, Porto Rico, and the Philippines (Santos v. Holy Roman Catholic Church, 212 U. S. 463; *Treaty*, Art. VIII, cited in Ponce v. Roman Catholic Church, 210 U. S. 296). The Pope was thus regarded as a sovereign power capable of making the concordat with Spain under which this corporate personality was originally conceded in those dominions. This same recognition is illustrated by reference to the purchase of Louisiana from France, the cession of California by Mexico and the acquisition of Florida from Spain. Upon admission to the Union as States, however, such territories ceased to recognize the legal personality of the Church as such, though the property rights were safeguarded. "The property rights of the Church were confirmed by Congress in what are now the states of Washington, Oregon and by special act after the Texan Revolution of 1848 the

Congress of Texas restored certain properties to the Church" (Baart, P. A., *The Tenure of Catholic Church Property in the United States of America*).

Though some of the States supported religious establishments for some time after the Revolution, their Constitutions are now in harmony with the Federal position. Two unmistakable evidences remain of the original union of Church and State in the colonies: the exemption of churches from taxation and the recognition of priests and ministers as public officers in the performance of the marriage ceremony. The constitutions of twenty-five States authorize the legislature to pass statutes exempting churches from taxation; thirteen others have self-executing clauses which either explicitly remove the burden of taxation or deny the legislature power to tax them. There are a few State constitutions, however, which still bear traces of the old common-law theory of mortmain; thus Virginia and West Virginia contain constitutional prohibitions against the incorporation of any ecclesiastical denomination; but these States will allow subordinate church organizations to incorporate.

The provisions of the State constitutions in general establish a system of religious equality, not of tolerance; one religion is not to be favored at the expense of another either in the laws or in its position under the law, or in the administration of government. They exempt all persons from compulsory support of religion and from compulsory attendance at religious services. They forbid restraints upon the free expression of religious opinion and upon the exercise of acts of religion.

In the courts, the judicial eye refuses to penetrate the veil of church regulation of its internal affairs, unless questions are involved on which property rights depend. This is held even by those jurisdictions which hold that the entity known as the church is based upon a contract or covenant of fellowship. There is a seeming contradiction involved here because, if the church as a spiritual unit is founded on a contractual basis, there is no reason why it should be exempted from civil jurisdiction. A line of cases has eliminated this evident inconsistency by holding that the church rests on something other than mere contract. This is the consistent holding of the Federal courts and the view of many of the State courts.

This "higher plane" theory might seem almost to recognize the moral personality of the spiritual association underlying the juri-

dical entity recognized by incorporation. It was first formulated in Watson v. Jones (13 Wallace 679 [U. S.]), an epoch-making case. The General Assembly of the Presbyterian Church in the United States had expressed sympathy with the cause of the Union, condemning the institution of slavery. The Supreme Court of Kentucky in 1867 declared that the General Assembly had exceeded its jurisdiction. Some of the parties to the action lived in Indiana. Hence the case was properly brought to the Federal courts. The Act of the General Assembly was upheld by the Supreme Court of the United States.

The decision in this case has a dual effect: first, it implicitly confers jurisdiction upon church organizations in internal matters, and secondly, it seems committed to a policy of recognition of church authority, evidently conceded to spring from a supernatural source. This latter effect is more specifically stated in a Tennessee decision: "Church membership stands upon an altogether higher plane, and church membership is not to be compared to that resulting from connection with mere business associations for profit, pleasure or culture. The Church undertakes to deal with spiritual interests. Admission to its fold is prescribed alone by the Church professing to act upon the Word of God." (Nance v. Busby, 91 Tenn. 303).

This was not an abdication of jurisdiction, as might be contended, but an admission that no jurisdiction could be claimed. It did not indeed give any church the juridical status of a State in the present system of public law, but it would be incorrect to say that ecclesiastical decisions are totally excluded from the domain of American public law in view of the credit that is thus extended them.

A fortiori, Federal courts are most favorable towards the juridical entity incorporated under proper statutes and have indicated disapproval of the mortmain practices followed in certain States. For instance, it reversed the Supreme Court of Illinois and decided that plaintiffs in Illinois could not raise the question that the grantee, a religious corporation incorporated under New York statutes, acquired a larger quantity of lands than its charter allowed. The land conveyed was situated in Illinois and granted by a citizen of Illinois (Christian Union v. Yount, 101 U. S. 352). So also it sustained the agreement made by a monk to forfeit certain property rights as a condition precedent to membership in a monastic institution duly incorporated under secular law (Order of St. Benedict v. Steinhauser, 234 U. S. 640).

The juridical entity is looked upon as a creature of the State. American jurists adopted this view, blindly ignoring its philosophical origin in theories of State Absolutism, at the same time that American legislators were loudly denouncing the corresponding principle of the Divine Right of Kings. Incorporation is, therefore, a franchise or privilege granted, not by the Crown, but by the legislature, either by specific act or under general statutes, though by prescriptive right a presumption arises as to the existence of a franchise which can not be found.

The Church can not confer such incorporation on its subordinate bodies. Unless incorporated by the respective legislatures, they remain merely organizations whose rights are the aggregate rights of the totality of the members exercised by duly appointed representatives. Secular incorporation does not affect the ecclesiastical element, but is regarded as calling into being a secular corporate medium, whose purpose is not to perform the spiritual duties of the Gospel, but to facilitate the management of temporal affairs. Thus the secular corporation will be congregational, while the ecclesiastical element may remain monarchical. It is held to be a private eleemosynary corporation, even though its scope includes many matters of a public character; it is a civil corporation and not an ecclesiastical corporation. In the colonies, of course, the ecclesiastical corporation, whether sole or aggregate, was a public corporation, in which membership was determined by residence, and which enjoyed the powers of eminent domain and taxation.

In the corporation sole, the person constituting the legal entity was a public officer. His death did not destroy the legal entity, which was referable to the person's office personified by a legal fiction. The idea was borrowed from England where the King and certain public officers were corporations sole. Rights and duties were suspended during the interregnum. It has survived the separation of Church and State in some jurisdictions, but now only as a private corporation.

Besides the corporation sole and aggregate, ecclesiastical corporations have taken the form of trustee corporations. In the corporation aggregate, the entire parish is incorporated, *de iure* each parishioner being a member of the corporation, even though only a few persons may be specifically mentioned as applying for and receiving the charter; *de facto,* the business of the corporation is transacted by the directors duly appointed under the charter and

by-laws. Trustee corporations, on the other hand, arose by the incorporation of certain members of the congregation to hold the property for the benefit of all. Previously, these trustees had held the property as individuals, but this was fraught with the danger, recognized by secular law, that the property might pass into the hands of heirs of the trustee, or to survivors in joint tenancy, or to reversioners after a life estate. The theory of incorporation was devised to preclude these evils. It did not provide that the societies delegate certain persons to become a corporation, but rather that corporate entity be automatically conferred upon the offices to which the persons were duly appointed. This incorporation was first provided for by special charters, but subsequently by general incorporating laws.

The temporal affairs of Catholic parishes were originally administered by a system of lay trustees, sanctioned by Archbishop Carroll. This sanction arose from two considerations. The missionary type of congregation was the rule, and the congregation was without the continued services of a priest, a situation necessitating lay tenure and control of ecclesiastical property. Secondly, Archbishop Carroll chose to adapt the Catholic method of management to suit the democratic spirit of American pioneer conditions, and to make it coincide, if possible, with the lay trustee scheme used by Protestant denominations. But lay control was often used to dictate ecclesiastical discipline, and the Holy See condemned the abuses in the Apostolic Letter, *Non sine magno* (24 August, 1822). In the future, all ecclesiastical property was to be assigned to the local Ordinary. This was confirmed by the resolutions of the Fourth Provincial Council which desired incorporation wherever possible, in the default of which property was to be vested in fee simple in the bishop. The security of the latter procedure was precarious, as was noted by the Third Provincial Council (1837) and the Fourth Provincial Council (1840). The latter attempted to guarantee security by insisting that the bishops draw up testaments in accordance with the formalities of secular law. This was insisted upon also by the decree of the Sacred Congregation for the Propagation of the Faith in the same year, which ordained that the will was to pass the property to another bishop who would make a deed to the proper successor. The Fifth Provincial Council (1843) modified this provision by requiring the bishop to file his will with his Metropolitan within a reasonable time after his consecration.

The episcopal fee system crumbled because of internal defects and external opposition. As to the latter, an example is available in a law passed by the New York legislature (1855), of doubtful constitutionality, declaring that the Catholic Church was endeavoring to evade the law by practices contrary to the spirit of American institutions, and providing "that no title to real property should be conveyed or descendible by an ecclesiastic to his successor in office". The inherent weakness is illustrated by the Baraga and Purcell cases. In the former, it became necessary to effect a private settlement with the European heirs of Bishop Baraga. In the latter, Archbishop Purcell had guaranteed the indebtedness of his brother who had undertaken to act as banker for Cincinnati Catholics and the latter's creditors attempted to recover $2,500,000 out of diocesan property; but the court saw a trust and denied the claim. Consequently the Third Plenary Council (1884) censured this system, though tolerating it as a last resort. By a decree of the Sacred Congregation of the Council, it was abolished in 1911.

This prohibition, however, does not preclude the holding of church property by the bishop in trust, even though it be not by express trust but only by constructive or resulting trusts in States where these are recognized despite the Statute of Frauds and the general rule of evidence against the changing of the terms of a written instrument. The peril involved in this system is that equity can always assume jurisdiction to disturb the trust; the majority opinion of the courts is that the bishop is a mere dry trustee, without actual power, and subject to the will of the parishioners. The property is as much in the power of the parishioners as if the legal title, and not merely the equitable, stood in their name. This same objection applies to the trustee corporation which is not necessarily condemned by the decree of 1911, i.e., if a majority of the trustees be clerics.

Besides, many States have rejected the system of incorporated trustees. It had its defects. Title received by absolute deed without designation of purpose could be disposed of only by determining the religious persuasion of the trustees at the time of the grant; judgments against the trustees as a corporation were worthless because the equitable title resided in the society as distinct from the corporation; and finally, every deed to the corporation had to contain an express declaration of trust, a clumsy process.

The decree of the Sacred Congregation of the Council of 1911 (*Ecclesiastical Review*, XLV [1917], 585) approved as the most desirable method of holding church property the corporation aggregate as adopted substantially by the New York legislature in 1863. In brief, the statute provided that the archbishop (or bishop), the vicar general, the pastor of the respective congregation, and two lay persons chosen by these three might incorporate the parish by filing an incorporating certificate with the Secretary of State. The courts of the State have construed the statute as incorporating all the members of the parish. No act of the trustees is valid without the sanction of the bishop, or in his absence or inability to act, of the vicar general or the administrator. The statute specifically indicates that it is framed for Roman Catholic and Greek churches. An amendment in 1902 provided that the bishop was authorized, acting by himself, to transfer property belonging to a prior congregation when a division occurs and to divide the receipts *pro rata* between the two congregations; but he may also transfer such property without consideration (Consolidated Laws of New York, Art. 5, §§ 90-92).

In theory, the statute of New York is contrary to the canonical concept of the ecclesiastical juristic personality since it insists that its creation is the result of legislative authority. But in practice the hierarchical structure of the church is made the groundwork of the corporation. (Cf. Canons 1427, 1519, 1521, 1530, §§ 1, 2, 3; 1532, § 2).

The decree of 1911 permits property to be held by the bishop as a corporation sole in dioceses where secular law precludes the recognition of parish corporations. Such would be the case where the incorporating laws of the State make no special provision for the incorporation of religious organizations. If a church were incorporated under such statutes, control would ultimately pass to lay members. The corporation sole was also favored by the Third Plenary Council. Under English law any benefice could be made a corporation sole. Blackstone maintains that there is no counterpart for the English corporation sole in Roman law; three members were required in Roman law for a collegiate corporation, and in an incorporated endowment it was the collection of goods that was the corporation. Romanists are not agreed whether the corporation sole existed in Roman law, though the affirmative opinion points to legacies without specification to the Emperor. After the pre-Revo-

lutionary era, the corporation sole has been little known, though some States have statutes applicable to all episcopal denominational systems; and in others, special statutes have enabled individual dioceses to be thus incorporated.

The advantages of the corporation sole are manifest. It insures security to ecclesiastical holdings by making them freely descendible to each holder of the episcopal office. It permits the Ordinary to carry on his corporate life by the application of canonical principles which will not be disturbed by the secular law. But there is a disadvantage in the possibility that equity might compel at the petition of the parishioners the surrendering of the legal title by the Ordinary to them. Moreover, the death of the Ordinary suspends the *de facto* corporate life of the corporation sole, resulting in inactivity and possible confusion.

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LEGAL ASPECTS OF CHARITABLE INSTITUTIONS

(A Digest of an article appearing in *Thought*, June, 1940, by Sister Ann Joachim, O.P., Ph.D., the only nun admitted to practise law before the United States Supreme Court, Chairman of the Social Science Department, Siena Heights College, Michigan.)

A charitable institution in the eyes of the law is not one that is called such in its Articles of Incorporation or its Charter, unless it so conducts its business as to be in truth a philanthropic organization. So incorporation under an act regulating non-profit organizations does not determine the character of the organization as non-profit. On the other hand, charges and profits are compatible with an essentially philanthropic aim. (Cf. 45 Arizona 507-46—P [2] 118; 69 N. Y. S. 106).

Providence Hospital of Oakland, California, was held to be a profit organization; its primary purpose was said to be profit, from which charity was dispensed; and the charity was regarded as dependent upon and sufficiently distinct to indicate that the first objective was profit. From the facts of the case, Providence Hospital had no stock or stockholders; its officers served without

remuneration; it accepted charity, semicharity, and full-pay patients; it maintained a free clinic for children and expectant mothers, and a free school for training nurses; it gave dole at its doors, free meals to indigent applicants, and assistance to poor families outside the hospital. On the other hand, it had paid off indebtedness incurred to erect its first building and was paying off further indebtedness incurred for a new site. (Cf. 87 P [2] 374; cf. also 273 N. Y. 163, appealed in 289 N. Y. S. 756).

On the contrary, a Missouri hospital was permitted to recover a judgment for services rendered, on the ground that a trustee may recover money owing a charitable trust. (Cf. 90 S. W. [2] 164).

Even when the institution is held to be charitable, the decisions fall into three groups as to its immunity from liability for damages: one grants it, the other denies it, the third compromises and relies upon circumstances. The decisions in the second group show a tendency to increase, though they are still in the minority. The Supreme Court of Utah has aligned itself with this group, denying that this indirect subsidy is needed (cf. 78 P [2] 645). So also in Minnesota it is held that where innocent persons suffer through the hospital's fault, it should not be exempted, and that it is almost contradictory to hold that an organization whose purpose is to dispense charity should extend aid to others, but should not compensate those injured by it in carrying on its activities (cf. 144 Minn. 372; 174 Minn. 389).

Into the second group fall also decisions in other States which hold for liability towards persons not beneficiaries of the institution's charity, e.g., paying patient, invitees on the premises, and strangers injured by the institution's vehicles. (Paying patient: 92 P [2] 996 [Oklahoma]; invitee: 116 N. J. L. 118; strangers injured by vehicles: 151 So. 797 [Louisiana]; 112 N. J. L. 129).

But the New Jersey courts held that a mother visiting a daughter, a patient in the hospital, was the recipient of the same benevolence as the patient and therefore could not recover damages (cf. 108 N. J. L. 453).[1]

[1] See opinion of The Supreme Court of Florida, December 20, 1940, under "Decrees and Decisions".

Cases and Studies

THE CLERICAL AND LAY STATE VERSUS THE RELIGIOUS STATE

Catholic Action has been defined as an apostolate of the laity. Considerable discussion has arisen in clerical circles as to who are the laity. The apparent clerical status of women religious and lay brothers has generated some confusion. With this in mind we have attempted to delineate the structure of moral states in the church.

The Church may be considered either *materially* or *formally*.[1] Under a material aspect, the Church is an aggregation of many temporal kingdoms all tending to a purely material objective. Considered formally the Church is a spiritual and supernatural republic, a mystical body, the members of which are united under One Head, Christ and His Vicar, by the bond of a common faith, by the open profession of that common faith and by the use of the same sacraments, all tending through the use of adequate means to Eternal Beatitude. Briefly, the Church is *materially* an aggregation of temporal civil societies; *formally*, a supernatural society.

Under whatever aspect the Church is considered, it is composed of a variety of moral states. In the temporal kingdoms there are various moral states: — there are free states as opposed to conditions of servitude; there are the rulers of the nations and their subjects, the people; there are the married and the celibate.

The Church *formally* considered, that is, considered as a supernatural society, likewise contains a multiplicity of states.[2] The Code says that there are in the Church clergy and laity, both of whom may be religious.[3] In other words, there are in the Church two states, the clerical state and the lay state; members of either state may be likewise constituted in the religious state. Is then the

[1] Suarez, *Opera Omnia*, (26 vols., Parisiis: 1856-1866), *De Virtute et Statu Religionis*, Lib. I, De Statu Perfectionis, C. II, n. 2.

[2] Conc. Trident., Sess. XXIII, *de sac. ordinis*, c. 4.

[3] Canon 107.

division of clerical and lay states an adequate and perfect division? And how is the religious state to be reconciled with both? The various states in the Church arise from two different sources.[4] One division of states arises from the public order, the social constitution, the government of the Church (in ordine ad bonum commune ac regimen spirituale Ecclesiae); another division of states has its origin in the private spiritual interests of the individual members of the Church (in ordine ad bonum spirituale singulorum).

The first division of states, that arising from the public order of the Church, is twofold. *By reason of public government*, the Church is made up of two states; the one, the clerical state, the other, the lay state. The members of the Church are constituted in one of two states; they are either in the clerical state or they are in the lay state.[5] This division is perfect and complete; it embraces every member of the Church; he who is not a cleric is a layman, and he who is not a layman is a cleric.[6]

Before we can show how and where the religious state fits into the structure of the Church we must consider another state, a state which is all-embracing, including every member of the Church both clergy and lay. But here it is well to remember that we are not considering the public constitution or government of the Church; we are considering rather the *Church in her relation to the private spiritual interest* of individuals. This state is the "status vitae Christianae". It is a state inclusive of all other states in the Church and opposed only to the state of the infidel. As Suarez says, "Status vitae Christianae non est nisi ratio aliqua vivendi stabilis et firma, ad salutem gratiae in hac vita et gloriae in futura consequendam, ordinata et instituta."[7] This "status vitae Christianae" contains a twofold "modus existendi". One of these conditions of Christian life is common to all the faithful, being as it is, necessary for salvation; the other is *a special* "modus vivendi" which embraces besides the purely necessary means, various supplementary aids to eternal salvation. Both these conditions of life have their own perfection and stability. Hence out of the "vita Christiana" there arise two states, the one "status vitae *communis* Christianae", the other "status *perfectionis*".[8]

[4] Suarez, *loc. cit.*, n. 3.

[5] Canon 948; Suarez, *ibidem.*

[6] Canon 107.

[7] Suarez, *loc. cit.*, n. 7.

[8] *Ibidem.*

The former, " status communis ", is common to all Christians. It is a necessary, an essential condition for the Christian. This condition is endowed with sufficient means for the attainment of a Christian perfection consisting in grace and charity. On the other hand, it has permanence and stability, based as it is on the sacrament of Baptism which makes a person perpetually subject to the obligations of the Church. Wherefore this " status communis " of Christian life is a moral state.[9]

The other division of Christian life in general is " status perfectionis ". As already stated above, in the state of perfection, means of attaining Christian perfection are more abundant. The state of perfection is distinguished from the common state in so far as the former brings to the latter something better, something more perfect. Therefore the state of perfection is distinguished from the common state as the " includens " from the " inclusum ". Since the common state is essential and necessary, it must be presupposed in every state tending to salvation. Therefore, the state of perfection is grafted, as it were, on the common state of Christian life.[10]

The religious state is a state of perfection. It is so because it is a stable institution, the objective of which is the attainment and exercise of Christian perfection.[11] The religious state being contained as it is under the state of perfection, pertains not to the " regimen publicum " of the Church but to the spiritual interest of individual members of the Church.[12] Hence it is evident that both a layman and a cleric may be religious without incongruity as stated in Canon 107.

From what has been said, it follows that one may be a religious and still remain a layman. Only those religious are clerics who are destined for the Priesthood and have already received tonsure. Wherefore " conversi " brothers who live in community and nuns, whether of solemn or simple profession, remain in the lay state of the Church. Though religious, they remain of the laity. However, they enjoy all the privileges of the clergy enumerated in the Title II of Book II of the Code with but one exception, that of Canon 118—which makes clerics capable of receiving the power of orders, juris-

[9] Suarez, *loc. cit.*, n. 8.

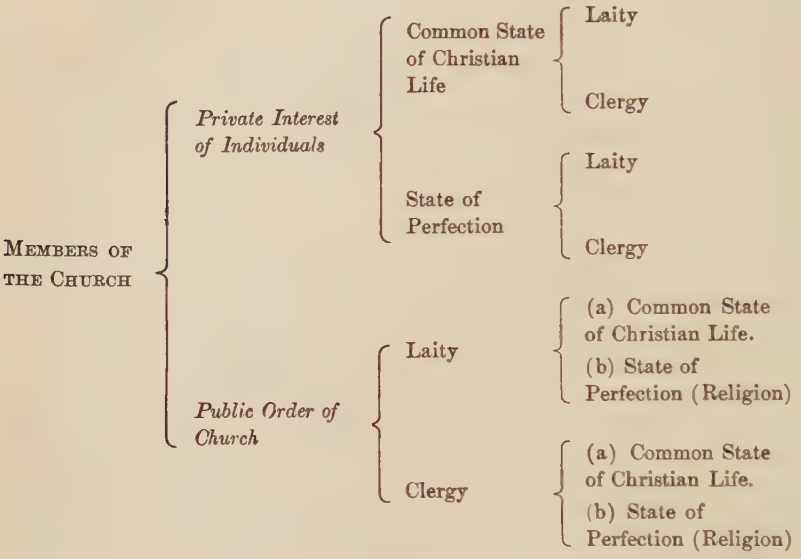
[10] Suarez, *loc. cit.*, n. 9.

[11] Wernz-Vidal, *Ius Canonicum* (7 tom. in 8 vols., Romae: 1923-1938), II, n. 5.

[12] Suarez, *loc. cit.*, n. 3.

diction, ecclesiastical benefices and pensions.[13] A person, therefore, may be constituted in any of those private states of the Church without losing his status as a layman.

The structure of ecclesiastical states may be summed up as in the figure below.



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[13] Canon 614.

PAULINE PRIVILEGE AND THE IMPEDIMENT OF CRIME

Laura, a recent convert, used the Pauline Privilege to marry Vincent, of this parish, three weeks ago. The Privilege was invoked because of the uncertainty of the death of the woman's husband, Donald. The facts were that he accompanied a party attempting to scale a high mountain peak, that he was separated from the party, that an avalanche buried and killed three members of the party, and that Donald was never heard of afterwards, that is for the last three years.

I now find that Vincent attempted marriage with this woman a year ago, immediately after she obtained a civil divorce.

I am wondering whether the impediment of crime arose out of this attempt, since it is uncertain whether or not the husband was alive at that time.

If it did exist, may I petition for a *sanatio* in order that it will be unnecessary to risk antagonizing the woman by asking her to renew her consent?

Under the Pauline Privilege the bond of a previous valid marriage contracted by two unbaptized persons is sundered only at the moment when the convert actually contracts marriage with a Catholic.[1] If the latter marriage is invalid, then the status of the previous marriage remains undisturbed. In the case at hand, if the marriage attempted by Laura gave rise to the impediment *crimen,* the use of the Pauline Privilege in subsequently marrying Vincent before a priest was ineffective because of the obstacle arising from the impediment. Consequently, the marriage to Vincent before a competent priest was invalid and the bond of the previous marriage to Donald remained intact.

Certainty of the death of Donald would affect the case in various ways depending upon the moment at which the death is proved to have occurred. Donald might be shown to have died before the invalid attempt of Laura, between that attempt and the use of the Pauline Privilege, or after the use of the Pauline Privilege.

Assuming the third hypothesis as adequately established and supposing the impediment *crimen* to have existed, the *sanatio* could not be granted by the Ordinary, and would not be granted by the Sacred Congregation of the Holy Office, even when it became certain that Donald died after the use of the Pauline Privilege by Laura.[2] For the Church does not grant a *sanatio* when the invalid marriage lacks validity because of an impediment of the divine or

[1] Canon 1126.

[2] Canon 1139, § 2.

natural law, even after the impediment has ceased. In the hypothesis, Donald was still alive, the Pauline Privilege was ineffective, and consequently the marriage was rendered invalid by the impediment *ligamen,* an impediment of divine law, as well as by the impediment *crimen.*

If it should be proved that Donald died after the attempt but before the use of the Pauline Privilege, by his quinquennial faculties the Ordinary could grant the *sanatio,* for the impediment *crimen,* incurred by the attempt as shall be supposed for the moment, is not an impediment of divine or natural law, but of ecclesiastical law.

If it should be proved that Donald had actually died prior to the first attempt between Vincent and Laura, there would arise no impediment *crimen,* even though the parties may have been guilty of *formal* adultery through erroneous or dubious consciences.

As stated, however, the present case does not dispose of the doubt as to whether Donald is still alive. Consequently if the Pauline Privilege was employed ineffectively due to the impediment *crimen,* the rights of marriage are excluded by two probable impediments *ligamen* and *crimen.* If, however, there arose no impediment *crimen* from the first attempt between Vincent and Laura, then the use of the Pauline Privilege was effective, and the death of Donald would become irrelevant to the case.

The determination of the problem touching the impediment *crimen* rests on a conclusion as to the *formal* guilt of the parties in making the attempt. The attempt was made with a doubt as to whether Donald was still alive. Invincible ignorance as to Donald's being alive would preclude formal guilt according to the unanimous opinion of authors; while *ignorantia affectata* surely would not, again according to unanimous opinion. Cappello [3] states that there is a *dubium iuris* as to *ignorantia crassa.* Schmalzgrueber [4] explicitly disagrees with Sanchez [5] when the latter holds that even *ignorantia crassa* is free from the *dolus* necessary for the sin of adultery and consequently for the resulting impediment. De Smet [6] holds with Sanchez; Gasparri,[7] with Schmalzgrueber. Hence under

[3] *De Sacramentis,* (ed. 4., Taurin.: 1939), III, n. 481.

[4] *Hoc cap.,* n. 11.

[5] *De Matrimonio,* VII, disp. 79, n. 38.

[6] *De Sponsalibus et Matrimonio,* (ed. 4., Brugis: 1927), n. 658.

[7] *De Matrimonio,* (ed. 9., 1932), n. 673.

Canon 15,[8] an attempt made with *ignorantia crassa* would not give rise to the impediment *crimen* because of the *dubium iuris*. For here the question is not one of ignorance of the law creating the impediment, but of ignorance concerning the act upon which the law bases the impediment.[9]

Clearly, Laura, unbaptized at the time of the first attempt with Vincent, was not subject to the impediment *crimen*, since the latter is a creature of ecclesiastical law. However, she would incur it by communication. On the other hand, the question of ignorance or doubt as to Donald's being alive relates to both parties; if either erroneously had moral certainty that he was dead, the impediment would not be incurred. This would be *ignorantia invincibilis*, which precludes the impediment according to all authors. It suffices that it exist in only one of the parties.[10]

Is *doubt* as to the cessation of the marriage bond equivalent to *ignorantia crassa?* Such would seem to be the line of argument of De Smet[11] and Vermeersch,[12] who excuse from the impediment *crimen* when at least one of the parties was in doubt as to the existence of the bond of a previous valid marriage. Substantially their arguments agree and consist in the statement, *dubitans non censeatur habere scientiam.*

Gasparri, however, confidently states that it is the unanimous opinion, *iuxta omnes*, that the impediment arises even when there is doubt as to the existence of the previous bond.[13] Payen agrees with the principle thus asserted and holds it as morally certain, though he admits that Vermeersch denies it.[14] Cappello also assents to it, and believes that *probabilius*, the impediment arises.[15]

The argument seems to proceed from a presumption that the impediment *ligamen* exists to a presumption that the impediment *crimen* exists, both presumptions yielding to proof that the spouse

[8] "Leges etiam irritantes et inhabilitantes, in dubio iuris non urgent; . . ."

[9] Canon 16: "Nulla ignorantia legum irritantium aut inhabilitantium ab eisdem excusat, nisi aliud expresse dicatur."

[10] Gasparri, *loc. cit.;* Cappello, *loc. cit.*

[11] *Loc. cit.*

[12] *Theologia Moralis,* (ed. 3.), III, 726.

[13] *Loc. cit.*

[14] *De Matrimonio,* (ed. 2., 1935), n. 1331.

[15] *Loc. cit.;* cf. Wanenmacher, *Canonical Evidence in Marriage Cases,* (Philadelphia: 1935), n. 491.

was dead. Clearly, knowledge of the existence of the impediment *ligamen* and knowledge of the presumption that this impediment exists are not the same kind of knowledge. Is the former knowledge required to give rise to the impediment *crimen?* Does the second kind of knowledge suffice? And thirdly, what if either party is ignorant of the presumption for the impediment *ligamen?*

One must bear in mind that the impediment *crimen* has a penal nature, even though it is incurred also by those ignorant of it. Therefore *benignior interpretatio est facienda, nec poena producenda de casu ad casum, quamvis par adsit ratio.*[16] Therefore it would seem that the impediment *crimen* should be restricted to the case where both parties have certain knowledge of the impediment *ligamen;* not when they have knowledge merely of the presumption that the impediment *ligamen* exists. This conclusion is entirely independent of the question of moral responsibility for adultery. The moral delinquency need not necessarily supply the adequate foundation for the impediment *crimen,* for the latter rests on a juridical concept not inextricably interwoven with the moral fault. Even a slight variation in a delict will usually excuse the delinquent from the juridical penalty.

A fortiori, the impediment *crimen* would not arise where there is total ignorance of the presumption for the impediment *ligamen* in the mind of even one of the parties.

There seems to be, therefore, adequate reason for the view of De Smet and Vermeersch, namely that doubt as to the survival of one's spouse is not the same as knowledge of that survival, and that only the latter condition results in the impediment *crimen.* A *dubium iuris* seems to exist, therefore, as to the sufficiency of doubt as to the spouse's survival for the creation of the impediment. Under Canon 15, therefore, that impediment may be regarded as not existing.

The Holy See indeed grants a dispensation from the impediment *crimen* when it decides favorably to the petitioner in a case of *mors praesumpta.*[17] But it grants this dispensation even to those who have not attempted marriage or been guilty of adultery with promise of marriage. Therefore, it is clearly granted *ad cautelam.* The action of the Holy See in so doing can not be construed as an im-

[16] Canon 2219, §§ 1, 3.

[17] Canon 1053.

plicit settling of the doubt, or as a decision that doubt as to the survival of a spouse is equivalent to knowledge that he does survive for the purpose of creating the impediment *crimen*.[18]

Therefore, as to the case at hand, one would decide that the impediment *crimen* did not rise as an obstacle against the effectiveness of the Pauline Privilege, and that a *sanatio* is not required.[19]

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Brookland, D. C.

[18] Cf. also Donohue, *The Impediment of Crime*, (The Catholic University of America Canon Law Studies, n. 69, Washington: The Catholic University of America, 1931), p. 42; Rice, *Proof of Death in Pre-nuptial Investigation*, (The Catholic University of America Canon Law Studies, n. 123, Washington: The Catholic University of America, 1940), pp. 109, 110. Neither of these authors would depart from the opinion of Gasparri.

[19] It should be observed that in the use of the Pauline Privilege as described in the case, a dispensation from the interpellations would be antecedently necessary from the Sacred Congregation of the Holy Office—Canon 1121, § 2.

LENTEN REGULATIONS

It seemed appropriate that reference should be made at this season to the Lenten Regulations issued by Ordinaries throughout the country. The regulations of the following Archdioceses and Dioceses were consulted: New York, Chicago, Boston, Baltimore-Washington, Newark, New Orleans, Milwaukee, Portland, Louisville, Brooklyn, Pittsburgh, Indianapolis, Denver, Nashville, Owensboro, Green Bay, Leavenworth, Belleville, St. Cloud, Seattle, Spokane, Fargo, and Quebec.

Eighteen of the twenty-three state the period for the Easter Duty as extending from the First Sunday of Lent to Trinity Sunday; one states that it is in virtue of a special indult. No. 257 of the Second Plenary Council does state that the indult was granted by Pius VIII (September 26, 1830), because of the scarcity of priests, the extent of the territory, and the already existing custom. The Council ordains that when the number of priests is adequate, the universal discipline is to be observed. This decree of the Council takes the indult out of Canon 4. However, the custom seems to be immemorial, but even such a custom is to be removed according to Canon 5, if it can prudently be done. It is interesting to note that the regulations of Quebec state the time as extending from Ash

Wednesday to Low Sunday; to Trinity Sunday for first communicants.

Nineteen speak of the Workingmen's Indult. Four give the date of the rescript granted to the specific Ordinary. Three imply such a special rescript. One refers back to the rescript of 1895, stating that it has been recently renewed. The dates given are all within five years. Five speak of the indult granted men serving in the army. Three of these omit the vigil of the Assumption as being among the days when soldiers must abstain. This was the difference between the two indults: soldiers must abstain on an extra day, the aforesaid vigil. One includes C.C.C. men. Another refers the source of the indult to Pius IX.

Nineteen, including Quebec, speak of the abstinence of Wednesdays in place of Saturdays. Only one besides Quebec gives the date of the rescript; both of these are dated within five years. Another implies the existence of a special rescript. Thirteen advise that the Wednesday of Holy Week is not a day of abstinence.

It seems certain that each Ordinary should apply for the Workingmen's Indult as well as for the indult for the substitution of Wednesday for Saturday as to abstinence. Neither of these privileges can be looked upon as immemorial customs, since the original indults are dated 1895 and 1880 respectively, and neither speak of a custom as existing at the time. The indult of January 20, 1880, granted by Leo XIII was a dispensation from the Saturday abstinence which was obligatory every Saturday in the year under the general law. At that time, all days except Sundays in Lent were days of abstinence. So by an indult of August 3, 1887, permission was obtained for meat at the principal meal on Mondays, Tuesdays, Thursdays, and Saturdays (except Ember Saturday and Holy Saturday). Thus the substitution of Wednesday for Saturday occurred through a combination of two indults. Both were granted for only ten years. All the other privileges of the indult of 1887 are now granted *de iure:* bread and beverage for breakfast (the Code does not limit the food to bread—Canon 1251, § 1); inversion of dinner and collation; the use of lard and fat in preparing foods; meat and eggs permissible at same meal; eggs and white meats permissible at all meals (the Code permits *fish* and meat at the same meal, which this indult forbade). Consequently, the only point for which an indult is needed is the Saturday abstinence, whether or not Wednesday will be substituted in the indult granting it.

The obligation of Wednesday, with the exemption of Saturday, is mentioned in a portion of the Indult of 1887 that was not limited as to time, but that extended only to the principal meal of persons fasting. As to non-fasting persons, exemption at all meals on Saturday was limited to ten years. Though the former portion might be held indefinite as to time, the latter can not. An indult covering this substitution was granted for two years by the Sacred Congregation of the Council to the Archbishop of Baltimore in behalf of the hierarchy,[1] on January 14, 1919.

The Workingmen's Indult, granted by the Sacred Congregation for the Propagation of the Faith, March 15, 1895, was privately granted to Cardinal Gibbons for all the Ordinaries of the United States. But the very terms of that indult show that it was given *distributive*, to each single Ordinary *severally*, rather than to the hierarchy jointly. The indult was valid for ten years. But the Sacred Congregation of the Council on January 5, 1926, extended for five years the indult of June 3, 1915, for workingmen, and the indult of June 2, 1920, as to the substitution of Wednesday for Saturday. Bouscaren states that the Workingmen's Indult was renewed February 12, 1926, according to a dispatch received from Boston. *The Ecclesiastical Review* in 1929 makes exactly the same statement. Woywod refers to " The Boston Pilot " of February 13, 1926, as stating that both indults had been renewed for the entire hierarchy.[2] Note that the date, February 12, 1926, is just a month later than January 5, 1926, when the indult was renewed in a rescript to the Archbishop of Baltimore. Does the dispatch refer to the same rescript? If so, it might seem to be a renewal only for the Archdiocese of Baltimore-Washington. If the rescript intended by the dispatch of the N.C.W.C. News Service was distinct from that received by the Archbishop of Baltimore-Washington, the conclusion might easily arise that it was a particular rescript for the Archdiocese of Boston, in view of the fact that just a month preceding, a particular rescript was issued to the Archbishop of Baltimore-Washington.[3] In any event, the time limit of both indults has expired: that for Wednesday abstinence in 1931; that for working-

[1] *The Ecclesiastical Review*, LX (1919), 574.

[2] *The Homiletic and Pastoral Review*, XXVI (1926), 1051.

[3] Bouscaren, *Canon Law Digest*, I, 591, 592; *The Ecclesiastical Review*, LXXX (1929), 187; Herrera, *Legislacion Ecclesiastica sobra el Ayuno y la Abstinencia*, (The Catholic University of America Canon Law Studies, n. 92, Washington: 1935), pp. 149-152; Barrett, *A Comparative Study of the Third*

men in 1936. No report of a general renewal of either is available. Since the indult of February 11, 1878, exempting men in the army from abstinence, was indefinite, it seems to be in force.

The indult of 1895 was clearly a relaxation of the obligation of abstinence. The one difficulty that might arise is this: could one be regarded a workingman under the terms of the indult and still be bound by the law of fast so that he would be permitted meat at only one meal? The indult itself does state that its beneficiaries who are not released from the law of fast, may profit by the indult only at the principal meal. But the persons indicated might reasonably be the members of the workingman's family, who enjoy the indult only indirectly, not because of their personal labors. It would seem that ordinarily at least labor so exhausting as to require the use of meat would *a fortiori* exempt from fast, so that the laborer would be obliged by neither law, and might have meat as often as he liked on the days permitted.

Under the indult of October 5, 1931, renewed in 1936 for five years, the Ordinaries have power to dispense from fast and abstinence on civil holidays. In consideration of Canon 1252, § 4, which excepts holy days in Lent from the rule that the law of fast and abstinence ceases on such days, it would seem inappropriate that dispensations for civil holidays should be granted under this indult during Lent.

AUTOMATIC SANATION OF MARRIAGE

Nathan, unbaptized, married Ruth, unbaptized, on March 13, and was divorced from her on August 31 four years later. Ruth became a convert to the Catholic faith and directed the interpellations to Nathan on February 2, two years later. He replied negatively and the next day, February 3, married Naomi, unbaptized. On February 4, the day following Nathan's second marriage, Ruth married Francis, a Catholic, before a competent priest, invoking the Pauline Privilege.

Naomi was divorced five years later from Nathan and now desires to marry Martin, a Catholic, but is unwilling to become a convert.

The problem in the case as stated turns upon the validity of the marriage of Nathan to Naomi. On the facts as stated, that marriage was invalid even supposing that there was involved no impediment of the secular law, *v.gr.*, lack of age or the existence of

Plenary Council of Baltimore and the Code, (The Catholic University of America Canon Law Studies, n. 83; Washington: 1932), pp. 149-151.

the degrees of kindred forbidden by secular law. For unbaptized persons are bound by the impediments of secular law, as well as by those of natural and divine law.

One may suppose, however, from the statement of the case that *ligamen* was the only impediment. It was, of course, sufficient to render the marriage invalid. It existed in spite of the fact that the interpellations had been addressed to Nathan the day before the marriage. The negative reply he gave did not sever the bond of his marriage to Ruth. That bond ceased only at the moment when Ruth, invoking the Pauline Privilege, married Francis before a competent priest.[1]

The question then arises, does the perseverance of consent between Nathan and Naomi automatically render their union valid, i. e., subsequent to the marriage of Ruth to Francis? If either Nathan or Naomi were baptized, such an automatic *sanatio* would be impossible under ecclesiastical law. Indeed, Canon 1138, § 3, asserts that a *sanatio* can be granted by ecclesiastical authority even if both parties are ignorant of the impediment, but Vermeersch [2] seems rightly to argue from the implicit content of the canon that without a dispensation from ecclesiastical authority, at least one party must renew the consent. For renewal by one party Canon 1135, § 3, provides. In permitting this, when only one party is aware of an occult impediment, the canon implicitly states that this is the ultimate concession *de iure*. Payen [3] concurs in the view of Vermeersch and advises that the existence of the impediment be revealed to one of, or if the impediment, as *ligamen*, is public, to both the parties, for renewal of consent. If it be unwise to make this revelation, the only alternative is to seek a *sanatio* from ecclesiastical authority.

Ecclesiastical authority would not grant a *sanatio* in the instance described in the present case. It refuses to heal a marriage, even after the cessation of the impediment, when the impediment, as *ligamen* in the present case, is founded in the natural or divine law.[4]

In the case of Nathan and Naomi, however, neither were bound by the ecclesiastical law requiring the renewal of consent. Gasparri,

[1] Canon 1126.

[2] *Theologia Moralis* (ed. 3.), III, 765.

[3] *De Matrimonio* (ed. 2., 1935), n. 2560.

[4] Canon 1139, § 2.

Cappello, and De Smet concur in conceding this.[5] Cappello avers that prior to the Code the contrary was held by some authors, but that even then it was improbable, because in certain instances the Holy See did not insist upon renewal of consent by the unbaptized, even when the existence of the impediment was known by one of the parties who refused to renew the consent.

But precisely because Nathan and Naomi were unbaptized, they were subject to the provisions of secular law. Now secular law recognized as valid the marriage which took place on February 3, the day preceding the marriage of Ruth to Francis. That marriage was invalid, however, under the divine law. Will secular law permit automatic *sanatio* on February 5, subsequent to the marriage of Ruth and Francis, without any renewal of consent, i.e., merely by continued habitation as husband and wife, of the parties concerned?

Here one must not confuse the presumption that might arise in a State which recognizes *common law* marriages from such continued habitation. Such a presumption is usually *iuris* but not *de iure* so far as the secular forum is concerned. In any event it is not binding on the ecclesiastical judge who desires to know whether the presumption is verified by the realities of the case. He seeks to know not whether the parties are presumed to have exchanged matrimonial consent but whether they actually did. In other words, though unbaptized persons are not governed by ecclesiastical rules pertaining to the solemnization of marriage, but by the rules of secular law, the ecclesiastical judge is not bound by secular adjective law in discerning whether or not the secular rules were observed. However, the requisites for *common law* marriage should not be considered greater than those of the natural law, unless specific statutes indicate this to be the case. Consequently, the marriage of Nathan and Naomi should be regarded, in States permitting *common law* marriages, as healed by the continued habitation after the dissolution of the bond of Nathan's previous marriage.[6]

[5] Gasparri, *De Matrimonio*, (ed. 9., 1932), n. 1193; Cappello, *De Sacramentis*, (ed. 4., Taurin., 1939), III, n. 840, 4°; De Smet, *De Sponsalibus et Matrimonio*, (ed. 4., Brugis, 1927), n. 728.

[6] Alford, *Ius Matrimoniale Comparatum*, (Romae; 1938), nn. 396, 397; Long, *A Treatise on the Law of Domestic Relations*, (Indianapolis: 1923), n. 92.

The parties, unbaptized, were not subject to the ecclesiastical impediment *crimen*.

Though this would not be true in States requiring a definite ceremony or the presence of a definite presiding official, if the impediment causing the original invalidity was created and recognized by the State itself, it probably should be true with regard to an impediment of the divine law alone, such as *ligamen* after civil divorce *a vinculo*. Remember that inasmuch as the State does not regard that marriage invalid, it can not consistently demand a renewal of consent according to the formalities of its laws. For that reason, the marriage of Nathan and Naomi would seem validated without the formalities even in such a State. Since the State, recognizing the consent that was given invalidly regards it as valid not only when given but for all time thereafter until a divorce is granted by the secular court, compliance with the requisites of the natural law would seem to be all that is demanded even in the presence of formalities prescribed for the original marriage.

Therefore, the marriage of Nathan and Naomi in the present case should be held valid. Consequently Naomi is not free to marry Martin. The Pauline Privilege is, of course, available.[7]

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[7] It can not be too insistently urged that the Pauline Privilege is not meant to be an instrument of divorce. The idea of converting persons in order to enable them to invoke the Pauline Privilege is alien both to the mind of St. Paul who granted the privilege to converts and to the mind of the Church. Further, there must be proof that the convert was not partially blameworthy for the situation which resulted in the divorce. This proof should normally be offered under oath.

MASS AND COMMUNION ACCORDING TO THE ORIENTAL RITE IN A CHURCH OF LATIN RITE

On the occasion of a recent mission, at the closing services, the missioners brought in three priests of an Oriental Rite to celebrate Mass according to the Rite of the latter and to distribute Holy Communion according to the same Rite and under both species. Is such a promiscuity of Rite permissible?

The law of the Code is as follows. A priest must consecrate leavened or unleavened bread according to his respective Rite no matter in what church he celebrates Mass.[1] Ordinarily he must distribute Holy Communion according to the same rule, but in an

[1] Canon 816.

emergency he may distribute Holy Communion under the appearance of unleavened bread even though his Rite prescribe leavened bread and *vice versa*, always supposing the absence of a priest of the corresponding Rite and with the obligation of using the ceremonies of his Rite.[2] The faithful, *pietatis causa*, may receive Holy Communion consecrated in any Rite.[3] If a priest can not find an altar of his own Rite, he may celebrate Mass on a consecrated altar of any other Catholic Rite, but not on Greek *antimensiis*, and he follows his own Rite in the rubrics.[4]

The only clause in all these juridical provisions that might seem to justify promiscuity of Rite is that which permits the faithful to receive Holy Communion in any Rite, *pietatis causa*. Whether or not this is equivalent to a blanket approval will be discussed later in the response.

As to the celebration of the Holy Sacrifice, there is no doubt even in the law of the Code that the form of bread, the rubrics, and the altar are all to conform to the respective Rite of the priest. Only to the last, the altar, is an exception permitted, and then only in case of necessity.

A long series of legislative enactments justify the embodiment in the Code of the traditional attitude of the ecclesiastical legislator. Eugene IV at the Council of Florence prescribed that each Rite should observe its own Rite and customs.[5] Pius V (1566) repeated the injunction under penalty of suspension *a divinis;*[6] and Benedict XIV (1742) repeated the law for the Italo-Greeks, the numerous immigrants of Greek Rite who had settled in Italy.[7]

Both Cappello and Noldin indicate that only in an emergency is a priest justified in celebrating Mass in a church of an alien Rite.[8] Both of them give as an example of such emergency a priest traveling in a district where there is no church of his own Rite. Noldin adds that the Oriental should seek the permission of the Latin Ordi-

[2] Canon 851, §§ 1, 2.

[3] Canon 866, § 1.

[4] Canon 823, §2.

[5] Const., "*Laetentur coeli*" 6 iul. 1439, § 4—*Fontes*, n. 51.

[6] Const., "*Providentia*", 20 aug. 1566—*Fontes*, n. 113.

[7] "Const., "*Etsi Pastoralis*", 26 maii, 1742—*Fontes*, n. 328.

[8] Cappello, *De Sacramentis*, (ed. 4., Taurin., 1939), I, 814; Noldin-Schmitt, *Summa Theologiae Moralis*, (ed. 22., 3 vol., Oeniponte: 1934), III, 107.

nary, even in such a contingency, if he expects to celebrate Mass in the Latin church over a long period.

As to the reception of Holy Communion, Benedict XIV in the Constitution, "*Etsi pastoralis*", unequivocally forbade the Latin laity to receive Holy Communion from a priest of an Oriental Rite.[9] The relaxation of this strict prohibition began with Leo XIII, who permitted the reception of Holy Communion according to an alien Rite, but only in emergencies, and from the context of the letter it is clear that he is mindful principally of the necessities of the Orientals who are frequently deprived of the ministry of a priest of their own Rite.[10] The same comment is valid in the case of the decree of the Sacred Congregation for the Propaganda of the Faith issued a year earlier.[11]

Pius X, moved by his desire to foster frequent communion, seemed to extend somewhat the scope of the previous legislation, in his Constitution of 1912. There he laid down in substance the rules contained in Canon 866, §§ 1, 2, 3. These regulations come at the end of the Constitution after a thorough analysis of the historical situation. Though the preamble is filled with paternal approbation of the Oriental Rite, and though it expresses the desire that all Rites may find the symbol of their unity in the reception of the Holy Eucharist, it remains to be said that in the definite provisions set forth, the Easter Communion and the reception of Holy Viaticum are restricted to the forms of one's own Rite. Besides, even the tenor of the whole Constitution, considered integrally, is opposed to the notion of promiscuity. The phrase, *pietatis causa*, is used in the sense of his predecessor, i.e., when there is some *incommodum* preventing the reception of Holy Communion according to one's own Rite.[12]

Capello, interpreting the present law in this sense, indicates that should one be obliged to postpone the reception of Holy Communion if obliged to await a priest of his own Rite, he may receive

[9] *Fontes*, n. 328.

[10] Litt. ap., *Orientalium*, 30 nov. 1894—*Acta Sanctae Sedis*, XXVII (1894-1895), 257; *Fontes* n. 627.

[11] Decr. 18 aug. 1893—*Collectanea S. Congregationis de Propaganda Fide*, (2 vol., Romae: 1907), n. 1846.

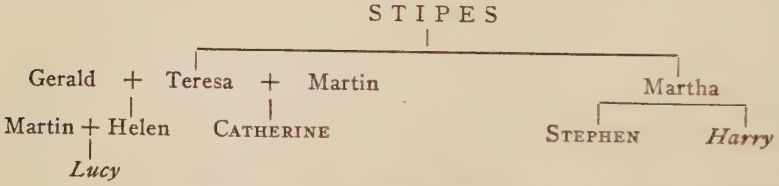
[12] Const., "*Tradita ab antiquis*", 14 sept. 1912—*Acta Apostolicae Sedis*, IV, (1912), 615.

according to an alien Rite.[13] Noldin concurs in the view that the present law requires some *incommodum* to permit reception in a Rite different from one's own.[14]

One should then probably conclude from the foregoing that what the missioners permitted was an undue promiscuity of Rite, not warranted by the exceptions made by the law for cases of emergency. Such a conclusion of course would need to be modified in the presence of a special indult possessed either by the missioners or by the priests celebrating the Mass and distributing Holy Communion.

Degrees of Kindred

Martin, a Catholic while bound by a valid marriage, attempted marriage after a civil divorce with Teresa, also a Catholic. One child, Catherine, was born to this union. Martin later married Helen, the daughter of Teresa, before a justice of the peace, after obtaining a civil divorce from Teresa. One child, Lucy, was born to this union. Catherine and Lucy now wish to marry two brothers, Stephen and Harry, sons of Teresa's sister, Martha. They seek the necessary dispensations.



Though the case as stated seems involved and complicated, the solution is not too difficult. Noting certain impediments that are not involved in the request for dispensations, one observes that the impediment *crimen* arose between Teresa and Martin, so that to validate that marriage after the death of Martin's wife, a dispensation would be needed (Canon 1075, 1°). This the Ordinary can grant in virtue of his quinquennial faculties, given of course an adequate canonical cause. Since this impediment is one *gradus minoris, obreptio* or *subreptio* even as to the sole cause of the dispensation, would not invalidate it. Of course, the impediment *crimen* in its grosser aspect is not an impediment *gradus minoris.*

In the present case, moreover, there exists the impediment *publicae honestatis,* between Martin and Helen, arising out of Martin's in-

[13] *Op. cit.,* I, 524.

[14] *Loc. cit.*

valid marriage to Helen's mother (Canon 1078), and from this impediment also the Ordinary can dispense in virtue of his quinquennial faculties. It is, in the first degree, however, an impediment *maioris gradus,* subject by *obreptio* and *subreptio* to invalidity. *Ligamen* also binds, if Martin's wife survives.

If Stephen had first married Catherine and then desired, after the latter's death, to marry Lucy, his valid marriage to Catherine would be sufficient foundation for the impediment of affinity between him and Lucy, even though both women were born of invalid marriages. That impediment would be twofold: arising out of the double relationship existing between Catherine and Lucy, one through the *stipes* represented by Martin, their father; the other through the *stipes* represented by Teresa, the mother of Catherine and the grandmother of the other. Thus relative to Martin they are related in the first collateral line; relative to Teresa, in the second collateral approaching the first. Stephen would contract this double impediment of affinity with Lucy resulting from his valid marriage to Catherine. (Canon 1076, § 2; Canon 1077, § 2, 1°.)

However, that impediment of affinity with the relatives of Catherine would not extend to Stephen's brother, Harry. On the other hand, both brothers are related through their mother to the descendants of Teresa by degrees of consanguinity, not of affinity. Stephen, to marry Catherine, needs a dispensation from the impediment of consanguinity in the second equal collateral degree; Harry needs a dispensation from the same impediment in the third collateral degree approaching the second.

Ordinations at Christmas

Because a number of priests of Diocese B have been accepted as army chaplains, the Bishop desires to ordain his next class at Christmas, permitting them to finish their seminary course, but calling on them for Saturday and Sunday work? Is this permissible?

Canon 1365 requires that the course of theology cover a period of four complete years. A scholastic year is to be taken as consisting of nine months according to a definition of the Sacred Consistorial Congregation.[1] Consequently, the four years should each consist of nine months. It must be regarded as an abuse when an attempt

[1] 24 March, 1911—*Acta Apostolicae Sedis,* III (1911), 181.

is made to crowd the thirty-six months into three calendar years by omitting the vacation periods. Indeed, it is an abuse even to contract the vacation periods so that, taking only one month's vacation each year, the candidate would be regarded as having completed thirty-six months of theological training within the month of December of his fourth scholastic year. The years are therefore to be spent according to the academic method of calculation.[2] Indeed, the definition of the Sacred Consistorial Congregation previously cited explicitly states that the fourth year can not be considered as finished by Pentecost or Trinity; *a fortiori* not by Christmas. Even if one would argue that the Sacred Congregation had taken the academic system as it found it, and was not thinking of the case in which scholastic months would be telescoped by the omission of vacations, one would be obliged to conclude that the use of the definite Feasts in pointing to a period at which the theological course can not be considered ended, indicated the desire of the Sacred Congregation that the telescoping should not take place.

Certainly, if no such telescoping has occurred, ordination to the priesthood at Christmas would be a violation of Canon 976, § 2. "*Post medietatem eiusdem anni quarti*", is the condition laid down for promotion to the priesthood. The *annus quartus* refers to the *cursus theologicus*. Vermeersch refers to a scholastic year as the total space of time during which lectures are given;[3] Cappello states that the scholastic year can be computed from the date of matriculation, even before the lectures commence.[4] The latter, therefore, says that priesthood may be conferred four and a half months after the date of matriculation. Vermeersch sets the time for this ordination at the beginning of the second semester, and Augustine agrees with this.[5]

In view of these opinions, it seems untenable that one should attempt to commence the calculation of the fourth year from the end of the third scholastic year, that is, including the three months of the summer holidays and adding three months of the *real* scholastic year.

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[2] Coronata, *Institutiones Iuris Canonici*, I (Taurini: 1939), n. 598.

[3] Vermeersch-Creusen, *Epitome*, (ed. 5., Romae: 1934), n. 246.

[4] Cappello, *De Sacramentis*, II, 3 (Taurini: 1935), n. 414.

[5] Augustine, *Commentary*, IV (St. Louis, 1921), 458, 459.

Decrees and Decisions

CANONICAL

Sacra Paenitentiaria Apostolica

DUBIUM

Circa absolutionem generali modi impertiendam militibus "imminenti aut commisso proelio".

In Indice facultatem quas SSmus Dominus Noster Pius div. Pro. Pp. XII concessit pro tempore belli, et de quibus in *Acta Ap. Sedis*, a. 1939, p. 710 et sqq., legitur:

"Imminenti aut commisso proelio . . . liceat . . . Sacerdotibus absolvere a quibusvis peccatis et censuris quantumvis reservatis et notoriis, generali formula seu communi absolutione, absque praevia orali confessione, sed doloris actu debite emisso, quando sive prae militum multitudine sive prae temporis angustia singuli audiri nequeant."

Iamvero quaesitum est: Quid faciendum si aliquando circumstantiae tales sint ut praevideatur moraliter impossibile aut valde difficile fore ut milites turmatim absolvi possint "imminenti aut commisso proelio"?

Sacra Poenitentiaria Apostolica, omnibus mature perpensis, respondendum censuit: In praedictis circumstantiis, iuxta Theologiae moralis principia, licet, statim ac necessarium iudicabitur, milites turmatim absolvere. Sacerdotes autem sic absolventes ne omittant poenitentes docere absolutionem ita receptam non esse profuturam, nisi rite dispositi fuerint eisdemque obligationem manere integram confessionem suo tempore peragendi.

Facta autem de praemissis relatione SSmo Domino Nostro Pio div. Prov. PP. XII ab infra scripto Cardinali Paenitentiario Maiore in Audientia diei 7 vertentis mensis, idem SSmus Dominus resolutionem Sacrae Paenitentiariae approbavit, confirmavit et publicandam mandavit.

Datum Romae, ex aedibus Sacrae Paenitentiariae, die 10 Decembris 1940.

L. Card. Lauri, *Paenitentiarius Maior.*

L. S. S. Luzio, *Regens* [1]

* * * * * *

DECRETUM

De directa insontium occisione ex mandato auctoritatis publicae peragenda.

Quaesitum est ab hac Suprema Sacra Congregatione: "Num licitum sit, ex mandato auctoritatis publicae, directe occidere eos qui, quamvis nullum crimen morte dignum commiserint, tamen ob defectus physicos nationi prodesse iam non valent, eamque potius gravare eiusque vigori et robori obstare censentur."

In generali concessu Supremae Sacrae Congregationis Sancti Officii, habito feria IV, die 27 Novembris 1940, Emi ac Revmi DD. Cardinales rebus fidei ac morum tutandis praepositi, audito RR. DD. Consultorum voto, respondendum mandarunt:

Negative, cum sit iuri naturali ac divino positivo contrarium.

Et sequenti die dominica, 1 Decembris eiusdem anni, SSmus D. N. Pius divina Providentia Papa XII, in solita audientia Exc. D. Adsessori S. Officii impertita, hanc relatam Sibi Emorum Patrum resolutionem adprobavit, confirmavit et publicari iussit.

Datum Romae, ex Aedibus Sancti Officii, die 2 Decembris, 1940.

Romulus Pantanetti,
Supremae S. Congr. S. Officii Notarius [2]

[1] *Acta Apostolicae Sedis*, XXXII (1940), 571.

[2] *Acta Apostolicae Sedis*, XXXII (1940), 554, 555.

Synod of Indianapolis

In line with the desire of this journal to be a clearing house of information among the dioceses, the following decree is published from the Synod of Indianapolis, of May 20, 1937, at which one hundred and thirty-five diocesan statutes were promulgated.

Decretum de Constituendis Examinatoribus Synodalibus et Parochis Consultoribus Necnon et Judicibus Synodalibus

Normis Juris Canonici fideliter inhaerentes (Cann. 385, § 1; 387, § 1; 1574) proponimus a Synodo approbandos:

IN EXAMINATORES SYNODALES

Adm. Reverendus Henricus F. Dugan, J.C.D., Moderator
Illmus. Revdmus. Joannes O'Connell
Reverendus Cornelius O. Bosler
Reverendus Patritius H. Griffin
Reverendus Joannes Doyle, Ph.D.
Reverendus Fintanus G. Walker, Ph.D.

IN PAROCHOS CONSULTORES

Illmus. Revdmus. Joannes O'Connell
Illmus. Revdmus. Fredericus Ketter, R.D.
Reverendus Andraeus Schaaf
Reverendus Timotheus Kavanaugh

IN JUDICES SYNODALES

Reverendus Jacobus Shea
Reverendus Josephus Clancy
Reverendus Clemens Zepf
Reverendus Clemens Bosler
Reverendus Josephus V. Somes, J.C.L.

Quod omnes a Nobis propositos atque a Synodo approbatos, hujus vi decreti in officium institutos declaramus, eosque sicut et caeteros Praepositos Dioecesanos jampridem a Nobis constitutos, quorum nomina nunc enuntiantur, sedula hortamur ut coram Synodo jusjurandum emittant de munere suo fideliter adimplendo.

† Josephus Elmerus Ritter,
Episcopus Indianapolitanus.

SECULAR

Charity's Liability for Torts

In the Supreme Court of Florida,
June Term, A. D. 1940

Dan Nicholson (Plaintiff in Error) vs. Good Samaritan Hospital, a Florida Corporation (Defendant in Error).

Writ of Error from the Circuit Court for Palm Beach County, C. E. Chillingworth, Judge.

Opinion filed December 20, 1940.

The plaintiff sued for damages alleged to have been sustained through severe burns caused by the negligence of a nurse of the hospital. There appeared no direct charge that the defendant was negligent in *employing* the nurse. The second count, however, did state that the burns were suffered "by reason of the said defendant's *negligently* entrusting the care of the plaintiff, while he was under an anesthetic, to an incompetent nurse."

> The second of three pleas filed by the defendant stated: And for a further plea, this defendant says that the Good Samaritan Hospital is an eleemosynary corporation and operates as a charitable institution and that being such it is not liable for a negligent act of an employee.

The error assigned in the appeal was the overruling of plaintiff's demurrer to this second plea. The case was one of first impression in the Florida jurisdiction, and the Supreme Court reversed the circuit court, holding the defendant liable.

The Supreme Court through Justice Brown reviewed the arguments usually given for exempting charitable institutions from tort liability by quoting from a decision in Minnesota.[1]

> That the funds of such institutions are held in trust for specific charitable purposes and should not be diverted to pay damages for negligence; that the better public policy is to hold them exempt; that they serve the same purpose as governmental agencies and should come under the same rule; that one who accepts benefits by becoming a patient, student, or beneficiary of the institution impliedly consents to hold

[1] Geiger v. Simpson Methodist Episcopal Church, 219 N.W. 463; 174 Minn. 389, 393; 62 A.L.R. 716.

> it exempt or to waive any claim for negligence of its servants; that the doctrine of respondeat superior does not apply to them; that their employees are not, in legal sense, servants of the organization.

The Court then proceeded to say that though the weight of opinion in the United States was in favor of exemption from liability, the various courts did not propose the same reasoning, but offered the diverse arguments just quoted, sometimes inconsistent with one another, in what appeared to be sincere attempts to rationalize the precedent set in Massachusetts in 1876.[2] That decision was based on a ruling of the English courts in the sixteenth century, though the English courts themselves have departed from the principle.

As to the first reason alleged above, that the funds are held in trust for specific charity, the Court noted that it should logically exempt a charitable institution from all liability, whether to a patient, an employee, or a stranger. However, it asserted that the weight of authority holds the institution liable for injuries to servants and strangers;[3] and requires due care in the selection of competent employees.

The Supreme Court of Nevada is cited as repudiating the "trust" theory, stating:

> A flood of cases might be cited holding that a charitable institution is liable for the negligence in the selection of its employees, for the negligence of its employees to strangers, or for some other reason. Every decision so holding, no matter how astutely the court may seek to evade the real question—that is, the charitable trust theory—is in fact, where the question is presented, a denial of that doctrine, for, as we have said, in substance, a charitable institution is either exempt or it is not. No sophistry, no refinement of argument, can consistently hold that a charitable institution is exempt in the one case and not exempt in the other.[4]

A second argument of which the Florida decision seeks to dispose is that which attacks the doctrine of *respondeat superior* on the ground that the employee is not *de facto* an employee in the case of a charitable institution. The contention is that the employees labor for the beneficiaries of the charity and not for the charity itself. Under that argument the charitable institution should be

[2] McDonald v. Mass. General Hospital, 120 Mass. 432; 21 Am. Rep. 529.

[3] Cf. 14 A.L.R. 575 (annotation); 109 A.L.R. 1199 (annotation).

[4] Bruce v. Y.M.C.A., 51 Nev. 798.

liable neither to strangers nor its own servants, nor for carelessness in employing the agents.

The third argument arises out of public policy, and the Florida opinion sees it as less vulnerable than other arguments advanced, and then proceeds to attempt a demonstration that it is vulnerable enough. It rejects the notion that charitable institutions discharge a governmental function and should therefore be exempt from liability.

The Florida decision cites precedent from its own decisions to define the powers of the judiciary with regard to public policy. That precedent states:

> Public policy is variable, the very reverse of that which is the policy of the public at one time may become public policy at another; hence no fixed rules can be given by which to determine what is public policy. . . . It is the province of the court to expound the law only, not to speculate upon what is best, in its opinion, for the advantage of the community, hence the public policy of a state or nation should be determined by its constitution, laws and judicial decisions; not by the varying opinions of laymen, lawyers or judges as to the demands of the interests of the public.[5]

Now there is nothing in the Florida Constitution, statutes, or judicial decisions exempting charitable institutions from this liability; on the other hand, the policy of the Constitution seems to put justice "by due course of law" above or before charity. A New York decision is quoted to the effect that

> to impose liability is to beget careful management; and that no conception of justice demands that an exception to the rule of respondeat superior be made in favor of the resources of a charity and against the person of a beneficiary injured by the tort of a mere servant or employee functioning in that character.[6]

That is to say, a second argument is thus adduced by the Florida court to show that public policy, rather than exempting charities from liability, should aim at promoting efficiency in the discharge of charitable duties vitally affecting the lives and health of the public. It decides that since there is no exception to the Florida of principle of justice "by due course", only the legislature, not the judiciary, can make one.

[5] A.C.L.R.R. Co. v. Beazley, 54 Fla. 311; 45 So. 716, 14th headnote.

[6] Sheehan v. North Country Community Hospital, 273 N.Y. 163, 7 N.W. (2d) 28.

A fourth argument which proves no obstacle to the Florida decision is that the institution should be exempt on the ground that it receives no private property or benefits from the acts of its servants. It rejects this argument even for charity patients and *a fortiori* for pay-patients on the ground of an undertaking vitally affecting life. The Court maintained that with regard to pay-patients, the hospital does make a profit and is in the same case as any other trust operated for profit. What the charitable institution does with the profit is irrelevant. A Utah opinion is cited in support of this view:

> . . . it is true that a hospital may not show dividends or profits "accruing to any person or corporation", but it may show an excess of intake over outgo over a series of years and absorb that recurrently in additions to the hospital or in other professed philanthropic ventures. In such case it could hardly be said that the hospital contributed toward the maintenance of the pay patient, and it could not the more be said because there could never under its articles be a distribution of any earned excess or division of the reversion among private individuals. I opine that the "Good Samaritan" would not have been quite such a "Good Samaritan" if he had said, "Come to my hospital. I will charge you for your keep and attention and a little more to help build a new wing on my hospital, and for that I shall expect the state to grant me immunity from the principle of respondeat superior which binds all businesses operated for profit." In the parable the inn-keeper received his full pay. He was not doing charity. And I assume that if the inn had cared for some indigent guests without charge but fixed its charges for the paying guests so that it could come out even, it would not be said to be a charitable institution, although doing some charity. I apprehend that a hospital running a store for profit would not be exempt from responsibility for negligence of its servants in the store because it used the profit, if any, to build more hospitals.[7]

The fifth argument impressed the Court no more favorably, that is, the argument of implied waiver. The Court held it is impossible to say, at least in most cases, that the recipient of benefits has knowingly agreed to waive any claim for benefits. Even those jurisdictions which accept this theory, the Court states, limit its application to charity patients, and exclude it even as to these when negligence in selecting servants can be shown.

[7] Sessions v. Thomas D. Dee Memorial Hospital Ass'n, 94 Utah 460; 78 P. (2d) 645.

The Court then cited comments of editors of Court reporters to the effect that even where the recent opinions have exempted charitable institutions, it has been with reluctance. It noted that it was not called to pass upon liability to a charity patient since the plaintiff was a pay-patient.

OBSERVATIONS

First, the Court seems to give final authority to the statement of mere editors that the weight of opinion rested on reluctant opinion, extorted, as it were, by a slavish adherence to a theory or a precedent.

Secondly, the argument based on the "specific trust" theory is rejected, not by a consideration of its merits, but by stating that courts which recognize it in part, to be consistent, should not recognize it at all. It is an attempt, not to weigh the validity of the argument, but to shift the weight of extrinsic authority.

Thirdly, the same procedure is used with regard to the argument that the servant of the charitable institution is the servant of the beneficiary and not of the hospital. The merits of the argument are not analyzed. The inconsistency of courts that rely on it in part is shown.

Fourthly, as to the argument from public policy, the Court actually defines public policy while saying that it has no power to do so; of course, it defines it as opposed to the exemption from liability, and bases it on an interpretative reading of the Constitution aided by the absence of contrary statute or decision. Further, the Court admits that public policy can be determined by judicial decisions but denies that judges can determine it. How can a judicial decision be reached unless a judge, somewhere, some time, hands down a decision! And who can say that any judicial decision is not influenced by the public acceptance of what is proper policy!

Fifthly, the attempt to divide the activity of a charitable institution into two categories, profit and non-profit, is perhaps logical but not real. If I devote my whole income to charity and sell magazines on the strength of that perfect generosity, who would deny that the subscribers meant their offering as to the profit element to be charitable and devoted to charity. Consequently, the excess paid by patients over the expenses of their maintenance is not too obscurely an offering to the work of the hospital.

Church Corporations

In the digest of Dr. Brendan F. Brown's dissertation appearing in this issue of The Jurist, reference is made to the decree of the Sacred Congregation of the Council approving the plan of incorporation of parishes provided in the New York Statutes.[1] The form approved is that in which of the five members of the corporation three are the following, the bishop, the vicar general, and the pastor.[2]

The same method is outlined substantially in the Statutes of Connecticut, where two lay members are appointed annually by the three incorporators already indicated; in case of the death or the disability of the bishop, the administrator and the chancellor take the place of the bishop and the vicar general.[3]

In Delaware the bishop and the pastor are *ex officio* members of the corporation; they select one other member annually; the other two members are elected annually by the congregation; the pastor is *ex officio* president.[4] The organization provided in Maryland is almost *verbatim* the same as that in Delaware, with the exception that the number of persons to be nominated by the bishop and pastor seems to be unlimited.[5]

The plan has received application also in the Statutes of Massachusetts. There the bishop, vicar general, and pastors, with their successors are *ex officio* members of the corporation, and they associate two laymen with them annually.[6]

Extension of the plan to the diocese is provided for in the laws of Minnesota. There the laymen have a two-year term. The administrator succeeds in the place of the bishop. In the diocesan corporation, the chancellor is substituted for the pastor.[7] Practically the same provision is found in the Statutes of Montana, except that there is no specified term for the laymen. Montana also per-

[1] 29 July, 1911—*The Ecclesiastical Review,* XLV (1911), 585, 586. Cf. Dignan, *A History of the Legal Incorporation of Church Property in the United States* (The Catholic University of America Studies in American Church History, n. 14, Washington: 1933), pp. 239, 240.

[2] Religious Corporations, Laws 1939, art. 5 (art. 5-A as to Ruthenians).

[3] §§ 3574, 3576—Statutes 1930.

[4] § 2483—Code 1935.

[5] Art. 23, § 287—Code 1939.

[6] C. 67, §§ 44, 45—Annotated Laws, 1933.

[7] §§ 7975, 7976—Statutes, 1927 (revised to 1940).

mits the corporation sole.[8] Nebraska outlines in more general terms the same plan.[9]

In New Jersey, provision is made for both the parish and the diocesan corporation, but in the diocesan corporation, two priests instead of two laymen make up the number of incorporators with the officials of the diocese, and no term of office is specified for either the priests or the laymen who thus serve.[10] The Minnesota plan prevails in Oregon [11] for both parish and diocesan corporations and in Wisconsin for parish corporations.[12] The plan seems possible in Wyoming under the general provisions for incorporation.[13]

The decree of the Sacred Congregation permitted the corporation sole as an alternative. The incorporation of the bishop as a corporation sole is possible in a number of States, almost entirely in the far West. Alabama,[14] Arizona,[15] California,[16] Idaho,[17] Maine,[18] Montana,[19] Nevada,[20] Oklahoma,[21] Utah,[22], Washington,[23] Wyoming[24] are the States where it is permissible under the statutes. It is probably available also in New Hampshire [25] where a minister and his successors are authorized to hold property. Provisions similar to those that enable a bishop to become a corporation sole are found in Michigan [26] and South Dakota,[27] where the bishop and

[8] §§ 6459, 6462—Revised Code 1921.

[9] § 24-802—Compiled Statutes 1930.

[10] §§ 16: 15-1, 16: 15-9 (for Ruthenians §§ 16: 16-1, 16: 16-9).

[11] § 25-927—Code 1930.

[12] § 187.12—Statutes 1931.

[13] § 28-602—Revised Statutes 1931.

[14] § 7112—Code of 1928.

[15] P. 131—Revised Code of 1928.

[16] § 605g—Civil Code 1937.

[17] § 29-1201—Annotated Code 1932.

[18] C. 119, § 6—Revised Statutes 1930.

[19] § 6463—Revised Code 1921.

[20] § 3224—Compiled Laws 1929.

[21] § 9937—Statutes 1931.

[22] § 931—Compiled Laws 1917.

[23] § 3884—Compiled Statutes 1932.

[24] § 28-610—Revised Statutes 1931.

[25] C. 232, § 6—Public Laws 1926.

[26] § 10845—Compiled Laws 1929.

[27] § 8871—Compiled Laws 1929.

his successors may take legal title as trustees for the parishes. Certain dioceses have been made corporations sole by special legislative act: viz., Baltimore, Boston, Chicago, Manchester, Providence, and Charleston.[28] A corporation sole is absolutely forbidden in Delaware.[29] By special charter the Dioceses of Burlington and Natchez are incorporated.[30] No conveyance is valid in Delaware [31] or Vermont [32] unless the corporation to which it is made is incorporated. But a conveyance to a church group is valid in the District of Columbia even if it is not incorporated and has not appointed trustees.[33] Ohio [34] provides for the incorporation of the central cathedral church and allows also the incorporation of any religious endowment. The parish corporation seems left unmentioned because the central church could provide for the parishes.

Until 1935, it was impossible to organize a corporation in Pennsylvania unless it was controlled by a majority of laymen. This was in virtue of the Act of April 26, 1855. It was amended, however June 2, 1887, and May 20, 1913. The net result was that parishes could appoint the bishop or any other ecclesiastical person trustee for the property. But he was only a dry trustee. Of course, Brothers and Sisters could organize corporations under their own control inasmuch as they were conceived to be lay persons.[35]

However by an Act, No. 160, signed by Governor Earle on June 20, 1935, the law was further amended. The items in italics indicate the additions to the previous law; the items in brackets indicate the items expunged from the law. It reads as follows:

[28] For Chicago (Laws 1845, p. 322); for Manchester (March 7, 1901, Laws 1901, c. 232, p. 723); for Providence (1900, Acts January 1900, pp. 133, 134); for Boston (cf. the Constitutions of the Archdiocese); for Charleston (cf. Father Hopkins' history of St. Mary's Parish, p. 73); Baltimore was created a corporation sole in 1833—the two last, with their references are to be found in Dignan, *op. cit.*, pp. 259-263.

[29] §§ 2488, 2489—Code 1935.

[30] In Natchez, the bishop, the vicar general, and four diocesan consultors were incorporated for a period of fifty years—*Constitutiones Diocesis Natchetensis* (1922), p. 63; in Burlington, the corporation is composed of five members chosen for life with the bishop as president *ex officio*—Articles of Incorporation, 1896—both cited by Dignan, *op. cit.*, p. 261.

[31] *Loc. cit.*

[32] §§ 2627, 2628—Public Laws 1933.

[33] Tit. 5, § 323—Code 1930 (revised to 1939).

[34] §§ 10022-1; 10011—Code 1936.

[35] § 2611—Statutes 1920.

AN ACT

To further [sic] amend section seven of the act, approved the twenty-sixth day of April, one thousand eight hundred fifty-five (Pamphlet Laws, three hundred twenty-eight), entitled "An act relating to corporations and to estates held for corporate, religious and charitable uses", by changing the method of holding the title to and controlling real and personal property heretofore or hereafter bequeathed, devised, or conveyed for the use of any church, congregation or religious society; and conferring jurisdiction upon courts of equity to enforce the provisions hereof.

Section 1. Be it enacted, &c. That section seven of the act, approved the twenty-sixth day of April, one thousand eight hundred fifty-five (Pamphlet Laws, three hundred twenty-eight), entitled, "An act relating to corporations and to estates held for corporate, religious and charitable uses", as last amended by the act, approved the twentieth day of May, one thousand nine hundred and thirteen (Pamphlet Laws, two hundred and forty-two), is hereby further amended to read as follows:

Section 7. Whensoever any property, real or personal [other than funds from plate, Christmas, and Easter collections, and annual voluntary contributions for salaries of clergy, teachers, organist and sexton] *has heretofore been or* shall hereafter be bequeathed, devised, or conveyed to any ecclesiastical corporation, bishop, ecclesiastic, or other person, for the use of any church, congregation or religious society, for *or in trust for* religious worship or sepulture, *or for use by said church, congregation, or religious society, for a school, educational institution, convent, rectory, parsonage, hall, auditorium,* or the maintenance of [either] *any of these,* the same shall be taken and held subject to the control and disposition of [lay members] *such officers or authorities* of such church, congregation, or religious society, [or the control and disposition of such constituted officers or representatives thereof, as shall be composed of a majority of lay members, citizens of Pennsylvania] having a controlling power according to the rules, regulations, usages, or corporate requirements [thereof so far as consistent herewith] *of such church, congregation, or religious society,* which control and disposition shall be exercised in accordance with and subject to the rules and regulations, usages, canons, discipline and requirements of the religious body, *denomination* or organization to which such church, congregation or religious society shall belong, [Provided, It shall be lawful for the majority of the male members, of lawful age,

of any unincorporated church, congregation, or religious society, to choose for their trustee or trustees any other person or persons than a layman; and, whenever not previously declared, to declare the manner in which the title to their said trust property shall be held and conveyed, subject, however, to all the terms and conditions upon which the same may have been bequeathed, devised, or conveyed to such unincorporated church, congregation, or religious society; and upon due proof of such consent, any court having jurisdiction over trusts may direct the legal title to be conveyed accordingly] but nothing herein contained shall authorize the diversion of any property from the purposes, uses, and trusts to which it may have been heretofore lawfully dedicated, or to which it may hereafter, consistently herewith, be lawfully dedicated: And provided, All charters heretofore granted for any church, congregation, or religious society, without incorporating therein the requirement that the property, real and personal, of such corporation, shall be taken, held, and enure subject to the control and disposition as herein provided, but which are in other respects good and valid, and shall be in all respects as good and valid, for all purposes, as if the said requirement had been inserted therein when the said characters were originally granted; and the title to all property, real and personal, [other than the funds above excepted] heretofore bequeathed, devised, or conveyed to such church, congregation, or religious society, or which may have heretofore been granted or conveyed by such corporation, shall be firm and stable forever, with like effect as though the said requirements had been contained in the charter of such corporation when the same was originally granted: Provided, That all property, real and personal, [other than the funds above excepted, now] held by such existing corporation, shall enure, and be taken and held, subject to the control and disposition as herein provided, with like effect as though such provision had been inserted in the charter of such corporation when originally granted, any other different provision therein notwithstanding.

Section 2. Jurisdiction is hereby conferred upon courts of equity to enforce the provisions of this act.

Section 3. This act shall become effective immediately upon its final enactment.

OBSERVATIONS

1. The control of lay members has been removed in the new act. Property conveyed to the bishop or other ecclesiastic is subject to the control and disposition of such authorities who have *de iure* control under the canons.
2. The whole provision for the appointment of a trustee has been expunged as being superfluous.
3. All sorts of diocesan and parochial purposes have been added besides the original worship and sepulture, and for all control and disposition are now warranted.
4. No funds whatsoever are excluded from this control. Originally the statute aimed at exempting liquid funds from lay control. Now, since the provision for lay control has been deleted, the exception has become superfluous.
5. The two last provisos have been adjusted to support the statute which has been completely reformed. The words of the provisos are left in substantially their original form, authorizing incorporated church groups to act according to the statute even though the charter of the corporation did not contemplate such procedure. The words justify such corporations in acting according to the new statute; almost in contradiction to the statute as it stood before the Act of 1935.
6. The Act would not seem automatically to incorporate every parish and every diocese. They are corporations under canon law. The Act might seem, by subjecting control to the authorities according to the regulations of the church, implicitly to grant incorporation. But that conclusion would transcend the language of the title, and can not be maintained. It does the nearest thing to secular incorporation; it justifies the agents of the canonical corporation to act in that capacity with effects which the secular law will recognize even as to property rights.

Reformation of Tax Exemption in the District of Columbia

The District Commissioners recently informed Congress that tax exempt properties privately owned in the District had a total valuation of $111,000,000.00. Much of this property is held by schools of various religious communities in the neighborhood of the University.

Early in March the Commissioners returned to the tax rolls the property of the Discalced Carmelites, and the newspapers regarded it as a precedent determining that the many chapels and monasteries could not be classed with churches for the purposes of exemption. The return to the rolls was made by approving a report made by the Real Estate Tax Exemption Board.

The property in question is assessed at $102,200.00. The annual tax bill would be $1,788.00. On the property there is a three-story and basement stone monastery and chapel. Religious services, open to the public, are held each morning except Sundays. Twenty-one students can be housed at the monastery, and these receive instruction on the premises and are supported by free-will offerings. The building contains besides the bed rooms, a class room, a library, two reception rooms, a dining room, and a kitchen.

The Exemption Board stated:

> Our law does not exempt all property being used for religious purposes, but the exemption statute does specifically exempt churches. Although there is no claim that this is a charitable or educational institution, we should say that it is neither one, within the meaning of our exemption statute. This, then, leaves for consideration the sole question as to whether the property is a church within the meaning of the statute. . . . If any portion of this building is a church, it must of necessity be the chapel, where religious services, open to the public, are held each morning except Sundays. We have reached the conclusion that the chapel of a monastery, although open to the public for worship, is not a church within the meaning of our exemption statute. A chapel adjacent to a church might be exempt if part of the church religious activities were conducted therein, on the theory that it was part of the church, but no such construction can be used here, as this chapel is adjacent to and part of the monastery. The paramount purpose of this order is outlined in its articles of incorporation—the chapel is incidental thereto. It is not referred to as a church, it has no regular church membership, and the primary use is for the occupants of the house of theological studies which adjoins it. A church is a body of people, of worshippers, associated together for religious purposes. It consists of an indefinite number of persons of one or

both sexes, who have made a public profession of religion and who are associated together by a covenant of church fellowship. . . . Here there is no united body of persons associated together for the purpose of maintaining worship, that is, a separate body formed within a parish, or religious society, whose rights are well known and established by law.

The Statute to which reference is made appears under Title 20 of the Code, §§ 712, 713. It reads:

The property exempt from taxation shall be the following and no other (except as otherwise specifically provided in this Code), namely: First, the Corcoran Art Building, free public library buildings, churches, the Soldiers' Home, and grounds actually occupied by such buildings; secondly, houses for the reformation of offenders, almshouses, buildings belonging to institutions of purely public charity, conducted without charge to inmates, profit or income; cemeteries dedicated and used solely for burial purposes and without private income or profit; but if any portion of such building, house, grounds, or cemetery so in terms excepted is larger than is absolutely required and actually used for its legitimate purpose and none other, or is used to secure a rent or income, or for any other business purpose, such portion of the same, or a sum equal in value to such portion, shall be taxed against the owner of said building or grounds; thirdly, such property as is exempt from taxation by the laws of the United States. So also shall every rectory, parsonage, glebe house, and pastoral residence for the pastor, rector, minister, or rabbi be so exempt in the District of Columbia: *Provided*, That such rectory, parsonage, glebe house, and pastoral residence be owned by the church or congregation for which the said pastor, rector, minister or rabbi officiates: *And provided further*, That not more than one such rectory, parsonage, glebe house, or pastoral residence shall be so exempt in any one congregation (Mar. 3, 1877, 19 Stat. 399, 402, c. 117, §§ 8 and 18; Aug. 15, 1916, 39 Stat. 514, c. 342).

Property used for educational purposes that is not used for private gain shall be exempt from taxation and all other property used for educational purposes shall be assessed and taxed as other property is assessed and taxed (July 1, 1902, 32 Stat. 616, c. 1352, § 5).

OBSERVATIONS

1. The word "church" in the Statute does not mean a body of people as the Board is reported to have said. It means a building. The definition used by the Board is taken from the court's definition in Stebbins v. Jennings, 27 Mass. 172, and in First Baptist Church v. Witherell, 3 Paige 296 (N. Y.), and quoted *verbatim* in *The Canonical Juristic Personality*, by Dr. Brendan F. Brown of the School of Law, The Catholic University of America, p. 122. The reference is not to a building but to the

association called the religious society. But in the Statute the word means " building ".

a—" and grounds occupied by all such buildings "; this is added to the list of buildings, including churches which are exempt.

b—" if any portion of such building is larger "; if the congregation is meant to be exempted by the Statute, all its buildings and properties, even those bringing in rent, would be exempt.

2. Therefore church membership seems irrelevant under the Statute. A building used for divine worship is a church even if supported by one man, for instance, near a railroad station for the benefit of transients, with no other congregation to support it.

3. The chapel in question is used for such divine worship actually by the public.

4. Supposing that the Statute did require that a church have a membership roll to be entitled to exemption, what of the members of the Order? Do they not constitute a membership roll? If in a declining section of a city an ancient congregation would retain only twenty-one names out of an original thousand or more, would it be said not to have a membership roll? Are twenty-one monks to be regarded as excluded from building a church of their own simply because they are monks; if they were laymen, there would be no question that a membership roll would exist.

5. Considering the building as a house of theological studies, which it is actually called by the Board of Exemption, how could the latter with a gesture dismiss its claim to exemption on the ground that it is *an educational institution?* The Statute is extremely wide as to such an institution. " Property used for educational purposes that is not used for private gain " is its language. Who will say that a house of theological studies is not used for educational purposes?

6. Even supposing that it be regarded primarily as a dormitory, the dormitory is *accessorium* and follows the nature of the building. The monks are in that building in the same way that students are in boarding halls on a university campus; the

dormitory halls are conditions *sine qua non* for the conduct of the educational purposes.

7. But the monks are actually trained in the building; and that is its primary purpose. How a house of theological studies could be regarded as a house dedicated to any other purpose except education is difficult to appreciate.

New York Statutes Benefiting Parochial Schools

"The Catholic News", of the Archdiocese of New York, answered in a recent issue the attacks of Newbold Morris, president of City Council, on the "released time" for the religious instruction of children in the public schools.

The "released time" is authorized by an amendment to § 625 of Article 23 of the Education Law, contained in the Laws of 1940, c. 305, and effective April 9, 1940. By the amendment, "absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

The Board of Education of New York City made the law effective there by a vote of six to one last November. Among those who voiced opposition before the Board was Dr. John Dewey, professor emeritus of philosophy at Columbia University. Organizations which appeared in protest were the Public Education Association, the Teachers Union, The Teachers Guild Associates, the Civil Liberties Committee, the New York Board of Jewish Ministers, the Parents Council of Peace, the Women's City Club of New York, and the United Synagogues of America. Three speakers spoke in favor of the plan: Mark Eisner, for the Jewish Education Committee, George J. Lent, of the Teachers Alliance, and Charles H. Tuttle, who represented thirty-three religious groups and school clubs.

The Laws of New York of 1939 contain several important measures relative to State aid to parochial schools.

To Article 20-B of the Education Law, was added § 578, effective June 5, 1939 (Laws of 1939, c. 731, § 3), authorizing the voters, trustees, or board of education to give health and welfare services including corrective aids and devices given to children in public schools when requested by authorities in other schools.

Also effective June 5, 1939, was the amendment in § 275 of Article 10 of the Education Law (Laws of 1939, c. 731, § 1), stating that trustees have the power of supplying for physically handicapped children transportation, home teaching, special classes, special schools, scholarships in non-residence schools, tuition or tuition and maintenance in higher as well as elementary schools, and on recommendation of the State Department of Health, crutches, braces, etc., regardless of the school attended.

Effective May 16, 1939, was the amendment in § 186 of Article 6-B of the Education Law (Laws of 1939, c. 465, § 1), relative to central rural schools, by which it is decreed that the commissioner of education has the power in any such rural district to require payment by the district of such expense of transportation of school children to and from schools they *legally* attend within

the district as in his judgment such transportation is required by remoteness or the promotion of the best interests of the pupils.

Every one of these is an enabling act, as will readily be seen, and not self-executing. Various officers are authorized to act. The legislature does not compel action.

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The general view that a body may not be disinterred without permission of the persons having control of the cemetery was confirmed in the Court of Common Pleas in Philadelphia, which decreed that the ecclesiastical authority of the Archdiocese had the right to decide whether bodies should be removed from the Catholic Holy Sepulchre Cemetery. The decision was handed down in a case where a petitioner sought to remove the bodies of her husband and infant son to the nonsectarian Laurel Memorial Mausoleum at Egg Harbor, New Jersey. The Court had ample precedent for its decision. It seems unfortunate therefore that it should have resorted to tawdry *dicta* as reported in facetious journalistic reports. The Court is alleged to have remarked that the "deserved peaceful sleep" of the dead should not be disturbed by "the whim of relatives, who, if encouraged, might change cemeteries as they do styles."

* * * *

Charitable trusts are not obliged to negotiate with labor unions under a decision in the Dauphin County Court of Pennsylvania in a case in which the State Labor Relations Board attempted to compel Holy Cross Cemetery, Philadelphia, to enter into such negotiations with cemetery laborers belonging to a CIO-affiliate.

Associate Justice James C. McReynolds, who retired from the Supreme Court Bench on February 1, is remembered as the Justice who wrote the opinion in the celebrated Oregon School Case, June 1, 1925, to which there was no dissent in the court. It declared the Oregon Compulsory Public School Attendance Law of 1922 unconstitutional, and restrained officials of the State from enforcing it.

"The fundamental theory of liberty upon which all governments in this Union repose", the opinion said, "excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the states; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

This decision was a frontal stand against the spirit that animated the sponsors of the public school system almost from the beginning, a secularist, pseudo-liberal, almost atheistic attitude which, in the spirit of modern dictators, looked upon the child as created for the state, to be educated by the state in the adulation of the state as its highest end. It set the current running in a truly liberal channel. The modification of bigoted laws in favor of children in parochial schools is the result.

(Cf. 45 S. Ct. 571; 268 U. S. 510).

* * * *

By a five to one decision, the Supreme Court of the State of Mississippi has upheld the decision of a lower tribunal, refusing to restrain the state's supplying free text books to children attending denominational and other schools not supported by state taxes. The lower court said . . . "these children are citizens of the state, and . . . the schools they attend are necessarily a part of the general educational system, . . . the education of children is of far more importance to the state than hair-splitting distinctions between 'public' and 'private', 'child' and 'children', 'sectarian' and 'non-sectarian', and . . . the loan of books to the child is a contribution to the state rather than to the school."

* * * *

"The Declaration of Independence and every State Constitution except those of New Hampshire, Oregon, Tennessee, Vermont, Virginia, and West Virginia mention God," said Rev. Edward Dowling, S.J., urging an amending clause to the preamble of the Federal Constitution, recognizing national dependence on God.

* * * *

Articles 3 and 5 of the Mexican Constitution may soon be amended, if bills emanating from the executive are accepted by the Congress. Article 3 makes "socialist education" obligatory in all schools, both public and private. Article 5, in defining civil liberties, prohibits the taking of religious vows and the establishment of monastic orders. It is not known how far these amendments will go in abrogating the provisions obnoxious to the freedom of the Church.

* * * *

Beginning with this year, religious instruction becomes obligatory in the primary public schools of Costa Rica. No child will be excused from these classes except on written instruction from parent or guardian, and proficiency in religious education will be as essential to promotion as in any other subject. It is a legalization of a situation that existed even during the administration of many non-believing governments.

* * * *

Senator David I. Walsh of Massachusetts, introduced a bill in Congress providing for the extension of the Federal old-age and insurance benefits of the Social Security Act to a million lay persons employed by religious and charitable organizations. The proposed legislation, the Senator said, is approved by the National Council of the Protestant Episcopal Church, the National Catholic Welfare Conference, the Council of Jewish Federations and Welfare Funds, the American Hospital Association, the American Association of Social Workers, Community Chests and Councils Inc., and the National Recreation Association.

* * * *

The death of Most Rev. Alexander MacDonald, who resigned the See of Victoria in 1923, recalls the litigation in which the property of the church in Victoria was condemned for tax arrears in the amount of $33,000.00. The bishop took action to prevent the seizure and sale of the cathedral. The Supreme Court of British Columbia rendered an adverse decision, but he won on appeal to the Supreme Court of Canada. The City of Victoria appealed to the Privy Council at London, where the Supreme Court of Canada was upheld in the bishop's favor.

Reviews

BOOKS

LAW AS LOGIC AND EXPERIENCE. By Max Radin. New Haven, Yale University Press. 1940. Pp. ix + 171.

In 1940, Professor Max Radin delivered the Storrs lectures at the Yale University Law School. These lectures are now published in the book, *Law as Logic and Experience.*

Professor Radin considers his subject over five published lectures. The first lecture is naturally the groundwork of the succeeding four. Therefore a detailed description of this lecture may be expected.

It must be assumed that Professor Radin is considering civil law as merely the positive enactments of a legislator. The author is not directly concerned with the ultimate morality of a law nor is he here interested in the source of the legislator's power to legislate. It would be vain to criticize the work of Professor Radin from a purely philosophical point of view. His purpose is to show that while logic does bear on law, the positive enactments of law are rather the result of experience. Logic, indeed, is used in the application of law. But, according to Professor Radin, its function is not so evident in the formulation of a law. This, of course, is not admitted by every student of jurisprudence. Nor has it always been the accepted theory of law. In fact, it would be difficult to reconcile Professor Radin's views entirely with the various definitions of a law. But, since this is a review of Professor Radin's lectures, no more need be said of the differences of schools.

Professor Radin opens his lectures with a tribute to the ability and influence of the late Associate Justice of the Supreme Court of the United States, Oliver Wendell Holmes. A quotation from the late Associate Justice's book on the common law is the keynote of Professor Radin's discourse. The quotation is, "The life of the law has not been logic: it has been experience." The concept of law is worked over in various ways by Professor Radin. His work is absorbing. The interest never lags. His view is clear-cut. His examples are well chosen.

The author proceeds to show how the subject matter of law is the result of experience. He indicates the rather narrow field in which

a law can operate. It is true, he does not always emphasize the regulatory aspect of a law, but he does not deny it. He is particularly felicitous in his treatment of marginal cases.

After describing his views in his first lecture, Professor Radin proceeds to apply his ideas. In his second lecture, he is at pains to show to whom the law applies. This might seem to be laboring the obvious, but it is something that is too often ignored in law. To say that a law applies to a human being in relation to another, or other human beings, is describing what every one knows. But do lawyers and judges always keep this in mind? Experience shows that the equity of a case is best obtained when this relationship is clearly seen and dutifully observed.

In this second lecture, too, Professor Radin outlines the utility of a lawyer. This is done in few but well chosen words. The utility of a lawyer is his ability to forecast a judge's decision. The practical worth of this observation need not be stressed. A lawyer may know the law, but if he can not forecast to his client what a future decision will be, the client is likely to be annoyed.

Likewise, in this second lecture, Professor Radin expatiates on the arbitrariness of the rules of evidence. He also stresses the difficulty experienced by a judge in forming his mind from the testimony of witnesses. These pages will create sympathy for the court. The handicaps are numerous.

Arbitrators are urged by Professor Radin in his third lecture. Related subjects, of course, are considered. It is Professor Radin's opinion that an arbitrator may be employed in many more instances than now.

The fourth lecture discusses lawyers and criminal law. Specialization is strongly urged. Professor Radin admits that some lawyers are a disgrace to their profession in accepting cases of evident criminals. But he shows further that a knowledge of penology is extremely useful, if not necessary to lawyers. In this lecture, he is careful to indicate the changing view of criminal law. A contrast is made between the modern and the earlier idea of criminal law. At this point, Professor Radin has some timely remarks on the detention and purge of persons alleged to be enemies of the State.

The fifth and last lecture opens with a discussion of equity. Comparisons and contrasts are made. An analysis of justice is offered. In this lecture, Professor Radin mentions what he feels is the purpose of the law in actual operation. One can not agree with

him entirely. He insists too much on the appeasement of quarrels and on the increase of good will as the purpose of law. These are worthy purposes of law but they ought to be the means of obtaining justice rather than be considered goals in themselves. However, it must be remembered that Professor Radin is describing the actual operation of law. He is not primarily defending a thesis.

Together with their serviceable index, the published lectures of Professor Radin are interesting reading. Lawyers who are anxious to see how the law looks to one of the very respected members of their profession will find *Law as Logic and Experience* a welcome book.

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PERIODICALS

PHILOSOPHY OF LAW

Miriam Theresa Rooney, "Law and the New Logic"—(Abstracts of Papers of the Sixteenth Annual Meeting of the American Catholic Philosophical Association), *The New Scholasticism,* XV (1941), 82. On the mathematical logic and its significance for the Common Law; according to the writings of modern non-lawmen, and the reception accorded their suggestions by the professional lawmen, W. W. Cook, J. Frank, and Thurman Arnold. Principles accepted by members of this non-Euclidean school of legal thought are evaluated with reference to Scholasticism.

PHILOSOPHY OF GOVERNMENT

W. Parsons, S.J., "The Influence of Romans XIII on Pre-Augustinian Christian Political Thought" (A historical study on the interpretation of Romans XIII, 1-7, in the early Fathers, from the Apologists to St. Jerome)—*Theological Studies,* I (1940), 337-364.

Luis Izaga, S.J., "Los fundamentos del Derecho Internacional en la última Encíclica del Papa" (Analyzes the teaching of the *Summi Pontificatus* on the foundations of International Law)—*Razón y Fe,* CXXI (1940), 209-224.

CHURCH AND STATE

Lucien Crouzil, "Une séparation concordataire" (Gives the history of the official relation between the Church and the French Republic since 1905)—*Bulletin de Litterature Ecclesiastique* (Toulouse, 1940), pp. 81-102.

"Diritto Concordatario" (Cases on marriage under the Italian Concordat)—*Perfice Munus,* XV (1940), 495-501.

THE SACRAMENTS

K. Sudbrack, S.J., "Das Alter der Firmlinge" (On the seventh year as the normal age for confirmation; cf. Canon 788)—*Theologisch-praktische Quartalschrift,* XCIII (1940), 285-297.

Liturgy

Gerard Heinz, O.S.B., "Decrees on Holy Week Services"—*The Homiletic and Pastoral Review,* XLI (1941), 521-523.

Marriage

W. Dunne, "Priests and Matrimonial Dispensations" (Canons 1043-1045 interpreted)—*The Clergy Review,* XIX (1940), 306-317.

History of Canon Law

Ae. Hermann, S.J., "Matrimonio romano e matrimonio cristiano" (Against the tendency to overemphasize the Christian influence on the Roman Law of marriage in Emperor Justinian's Codification)—*Orientalia Christiana Periodica,* VI (1940), 222-229.

Julia Gauss, "Die Dictatus-Thesen Gregors VII als Unionsforderungen"—*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte,* Kanonistische Abteilung, (*ZRG,* Kan. Abt.), XXIX (1940), 1-115. The famous series of maxims on the constitution of the Church, contained under the heading *Dictatus Papae* in the Register of Gregory VII and dating from 1075, should be explained as composed by the Pope in view, not of the Investiture contest, but of a projected union with the Greek Church.

Franz Gescher, "Synodales: Studien zur kirchlichen Gerichtsverfassung und zum deutschen Ständewesen des Mittelalters" (On the significance and position of the noble class of *synodales* in the medieval ecclesiastical courts and in medieval society)—*ZRG,* Kan. Abt., XXIX (1940), 358-446.

Vratislav Bušek, "Der Prozess der Indicia" (A study on the criminal procedure in the times of St. Ambrose, according to his letters regarding the trial of a certain Indicia [ca. 380])—*ZRG,* Kan. Abt., XXIX (1940), 447-461.

G. M. Löhr, O.P., "Die Mendikantenarmut in Dominikanesorden im 14 Jahrhundert" (The Poverty of the Mendicant Orders in the fourteenth century)—*Divus Thomas* (Fribourg), XVIII (1940), 385-427.

Gabriel Conto, O. Carm., "De ordine chronologico trium bullarum Innocentii pp. IV in Rem Carmeliticam"—*Analecta Ordinis Carmelitarum,* X (1940), 512-515.

M. Gordillo, S.J., "Photius et Primatus Romanus"—*Orientalia Christiana Periodica,* VI (1940), 6-39.

History of the Sources

S. Kuttner, "Die Konstitutionen des ersten allgemeinen Konzils von Lyon"—*Studia et documents historiae et iuris,* VI (1940), 70-131. The original series and the different stages of subsequent editions of the statutes of the First General Council of Lyons (1245). Appendices on the glosses of Pope Innocent IV, on the date of one of his decretals, on the origin of the red hat, on the canonist Goffredus de Trano).

R. von Heckel, "Die Dekretalensammlungen des Gilbertus und Alanus nach den Weingartner Handschriften"—*ZRG*, Kan. Abt., XXIX (1940), 116-357. The two valuable collections of Decretals, compiled in Bologna by the English canonists, Gilbert (ca. 1203) and Alan (ca. 1206), from the letters of Pope Innocent III and some of his predecessors, were made known by Schulte in 1870. Von Heckel resumes the study of the manuscripts, giving a more exact historical dissertation on and a full analysis of the two collections.

Vivian A. Peterson, "The Development of the Canon Law since 1500 A.D."—*Church History*, IX (1940), 235-252. A summary of the history of canonical legislation, with special reference to the Anglican Canon Law in the English provinces of Canterbury and York and in the United States.

"Priores Gratiani Adseclae" (Reprint of some biographies of canonists of the twelfth century, from M. Sarti, *De claris Archigymnasii Bononiensis professoribus*, [ed. 2., Bononiae: 1888], pp. 354 sqq.)—*Ius Pontificium*, XX (1940), 9-24.

History of the Sources and Science

Francois-Marie Henquinet, O.F.M., "Clair de Florence, O.F.M., canoniste et pénitencier pontifical vers le milieu du XIII^{e} siècle"—*Archivum Franciscanum Historicum*, XXXII (1939), 3-48. Gives Manuscript tradition of the "Summa Fratris Clari" (one of the many casuistic handbooks on penance for confessors in the thirteenth century); investigates the authorship and accepts the Minorite, Clarus of Florence, not Clarus of Arezzo, nor a Dominican of the name of Clarus; analyzes the content; determines the date of composition (1254-1255); and some points of his biography.

Consultations

"Supplet Ecclesia" and Marriages (Can Canon 209 be applied to marriages?) (pp. 474-476).
Restitution for Arson (pp. 476, 477).
Syrian Maronites Marrying in the United States (pp. 477-480).
Censures and Impubes (p. 484).
Rite a Priest Must Follow (p. 485).
Stipend for a High Mass (p. 487).
—*The Ecclesiastical Review*, CIII (1940).

Cooperation in the Use of Contraceptives (p. 77).
The Audibility of the Words of Consecration of the Mass and in the Conferring of the Sacraments (p. 157—James E. Sherman).
Intention for Mass (p. 165).
Morality of Dower Rights in an Invalid Marriage (p. 165).
"Commorantes" and Semi-public Oratory (p. 166).
Bringing Holy Communion to the Sick (p. 168).
—*The Ecclesiastical Review*, CIV (1941).

What Does Suspension Forbid? (pp. 319, 320).
Throat Trouble and the Eucharistic Fast (p. 320).
Instructions before Marriage when Groom and Bride belong to Different Parishes (p. 321).

Concerning the *Oratio Imperata* (p. 322).
High Mass by Recordings for Rural Parishes (pp. 323-325).
—*The Homiletic and Pastoral Review,* XLI (1940).

When Stations of the Cross Lose Their Blessing.
Where Should Marriage Instructions Be Given?
Validity of Baptism.
Midnight Low Mass.
—*The Homiletic and Pastoral Review,* XLI (1940), 532-534.

Validation of Marriage of Non-Catholics after Cessation of Diriment Impediment (p. 427).
Appeal to Civil Court from Diocesan Tribunal (p. 429).
Curates' Power during the Absence of the Parish Priest on Annual Holidays (p. 430).
Fee of Procurators and Advocates Engaged in Causes before the S. R. Rota (p. 431).

Private Oratory in Priest's House (p. 474).
May a Parish Priest of One Diocese Act as Administrator in Another Diocese? (p. 475).
May a Neighboring Parish Priest Be Appointed Vicar Substitute? (p. 475).
Expenditure of Money Gift Received by a Religious (p. 477).
—M. J. Fallon—*The Irish Ecclesiastical Record,* (5th series, 76th year) LV (1940).

The Sacred Congregation of Rites.
Duration of Superior's Office.
Devout Female Sex.
Anticipating Litanies.
Scapulars and Inscriptions.
Altar Cross during Benediction.
Non-Catholic Religious Vows.
—E. J. Mahoney—*The Clergy Review,* XIX (1940), 259-268.

"Scribere" in Canon 1386, § 1 (p. 352).
Diocesan Collections (p. 355).
Orationes pro defunctis (p. 357).
Duplication in Convent Chapel (p. 357).
Christian Name in Adult Baptism (p. 359).
Ex-religious in Minor Orders (p. 360).
Evening Communion (p. 544).
Per modum potus (p. 545).
Holy Communion in a House (p. 547).
Ambo and Pulpit (p. 550).
Celebrant with Defective Sight (p. 552).
"Pater Noster" Secreto (p. 553).
Stations of the Cross (p. 554).
The "Benedictus" Chant (p. 556).
—E. J. Mahoney—*The Clergy Review,* XIX (1940).

Easter Communion in Parish Church (p. 74).
Religious Profession (p. 75).
Marriage Dispensation in Canon 1045, § 3 (p. 77).
Housekeepers (p. 79).
Curate and Marriage Impediment (p. 81).
Burial in Non-Catholic Cemeteries (p. 83).
Burial of Non-Catholics (p. 84).
Sea Voyager's Faculties (p. 86).
Unlawful Baptismal Sponsors (p. 87).
—E. J. Mahoney—*The Clergy Review,* XX (1941).

Is Knitting Servile Work and Forbidden on Sundays? (pp. 241-250).
Proposed Alteration in the Method of Dividing Parochial Revenues between Pastors and Curates (pp. 250-252).
Right to Marriage Fee (pp. 252, 253).
Lawyer's Cooperation in the Sin of His Client (pp. 253, 254).
—J. J. Nevin—*The Australasian Catholic Record,* XVII (1940).

Matrimonium per procuratorem inter duas mulieres (p. 153).
Indultum apostolicum in expropriatione necessaria (p. 154).
Indulgentia in recitatione divini officii coram Ssmo (p. 155).
Epilepsia et irregularitas (p. 157).
—S. Goyeneche, C.M.F.—*Commentarium pro Religiosis et Missionariis,* XXI (1940).

Parroco e sacerdoti per funzioni parrochiali—Terziarie e processioni—Giov. Lardone—*Perfice Munus,* XV (1940), 494.

G. Oesterle, "Ehe ohne Taufschein" (marriage without baptismal certificate) (p. 312).

Dr. Kallen, "Zum Klagerecht bei nichtkatholischen Ehen" (rights of non-Catholics in marriage cases according to the decree of the Holy Office of March 22, 1939.—*Acta Apostolicae Sedis,* XXXI [1939], 131) (pp. 313-316).

V. Mocnik, "Zuständigkeit des Gerichts in einem Eheprozess aufgrund des Domizils oder Quasidomizils" (competence in marriage cases; domicile and quasi-domicile (p. 316).
—*Theologisch-praktische Quartalschrift,* XCIII (1940).

Stephan Kuttner

The Catholic University of America

Chronicle

GENERAL

On December 6, His Eminence, Henry Cardinal Gasparri, Bishop of Velletri and Prefect of the *Signatura Apostolica,* observed the silver jubilee of his episcopal consecration. He received a letter of congratulation from his Holiness, Pope Pius XII.

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His Eminence, Eugene Cardinal Tisserant, Secretary of the Sacred Congregation for the Oriental Church, dedicated in a simple ceremony the College of St. John of Damascus, as a residence for priests of Oriental Rites pursuing higher studies in Rome. The Superior General and the Vice General of the Society of Jesus were present. The College is placed under the direction of the Fathers of this Society. It will be open to students of the Athenaeum and of the Pontifical Oriental Institute. It occupies a portion of the Pontifical Russian College.

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On November 15 last the University of Fribourg observed the golden jubilee of its foundation. It is about to enter upon the erection of three buildings for the three faculties of theology, law, and letters. The University was established as a defense against the liberalism of 1830 entrenched in the Universities of Zurich and Bern, which arose from it.

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Most Rev. Richard O. Gerow, D.D., Bishop of Natchez, has given several military chaplains stationed at Camp Shelby the status of assistants, chiefly to enable them to assist at the marriages of non-Catholic soldiers with Catholic women.

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By virtue of decree No. 2015/41 of the Sacred Congregation of Religious, the Very Rev. Michael Jaglowicz, C.R., Superior General of the Congregation of the Resurrection, appointed a commission of three Fathers of the community, namely, The Very Rev. Thaddeus S. Ligman, C.R., Delegate General of the Congregation of the Resurrection in the United States. The Rev. Mitchell N. Starzynski, C.R., Editor-in-chief of the Chicago *Polish Daily News*, and The Rev. Bronislaus Lazarowicz, C.R., Pastor of St. Stanislaus Kostka Church, Chicago, who, under the presidency of The Very Rev. Thaddeus S. Ligman, C.R., are to receive reports, render decisions, make appointments, issue dimissorials, and transact all other matter of the United States region of the Congregation of the Resurrection, normally under the jurisdiction of the Superior General and his Council.

This Commissariat has been established by permissive decree of the Sacred Congregation of Religious only for the duration of the present European conflict. (This item was submitted by Rev. Francis J. Kieda, C.R., J.C.D., consultant for the Congregation of the Resurrection. He was erroneously listed in the first number as consultant for the Theatine Fathers.)

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On February 2, Most Rev. Joseph P. Hurley, D.D., Bishop of St. Augustine, celebrated the Pontifical Mass observing the four hundredth anniversary of the founding of the Society of Jesus. This was the latest of a series of ceremonies in various dioceses.

His Excellency, the Most Rev. Apostolic Delegate, presided at exercises in St. Aloysius' Church, Washington, D.C., commemorating the anniversary.

In New York, at the commemorative Mass celebrated in St. Francis Xavier's Church, four bishops were present in the sanctuary: Most Rev. Francis J. Spellman, D.D., Archbishop of New York; Most Rev. Stephen J. Donahue, D.D., Auxiliary Bishop of New York; Most Rev. Thomas H. McLaughlin, D.D., Bishop of Paterson, and Most Rev. James E. Walsh, D.D., Superior General of Maryknoll. The sermon was preached by Very Rev. Ignatius Smith, O.P.

The commemoration was observed in Philadelphia at a Pontifical Mass celebrated by His Eminence, Dennis Cardinal Dougherty, on September 29, in the Church of Gesu.

His Eminence, William Cardinal O'Connell, preached at the commemorative exercises in the Church of the Immaculate Conception, Boston.

The commemorative exercises in the Archdiocese of St. Louis extended from October 25 to October 27, with a Pontifical Mass each morning. The sermons were preached on the respective occasions by Most Rev. Francis C. Kelley, D.D., Bishop of Oklahoma City–Tulsa; Most Rev. Henry P. Rohlman, D.D., Bishop of Davenport; and Most Rev. James H. Ryan, D.D., Bishop of Omaha. The celebrants were respectively Most Rev. George J. Donnelly, D.D., Auxiliary Bishop of St. Louis; Most Rev. Henry Althoff, D.D., Bishop of Belleville; and Most Rev. John J. Glennon, D.D., Archbishop of St. Louis. Most Rev. Paul C. Schulte, D.D., Bishop of Leavenworth, spoke at a faculty dinner.

On September 29, the Pontifical Mass marking the 400th anniversary of the Society of Jesus and its 100th anniversary in the Archdiocese of Cincinnati, was celebrated by Most Rev. George J. Rehring, D.D., Auxiliary Bishop of Cincinnati. The sermon was preached by Most Rev. John T. McNicholas, O.P., D.D., Archbishop of Cincinnati.

Georgetown University, oldest Catholic college in the United States, also commemorated the centenary of the Society which has conducted it from colonial times. At the convocation, Very Rev. Arthur A. O'Leary, S.J., president of the university praised the labors of his community.

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Most Rev. Francis C. Kelley, D.D., Bishop of Oklahoma City–Tulsa, opened the fifth annual series of the "Call to Youth" radio program, on the air every Saturday during February, March, and April. Other members of the hierarchy who will appear on the program are: Most Rev. John A. Duffy, D.D., Bishop

of Buffalo; Most Rev. Richard Gerow, D.D., Bishop of Natchez; Most Rev. Edwin V. O'Hara, D.D., Bishop of Kansas City; and Most Rev. Emmet M. Walsh, D.D., Bishop of Charleston.

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The golden jubilee of Mother Katherine Drexel, foundress of the Sisters of the Blessed Sacrament, will be celebrated on April 18. The actual date of profession was February 12. Mother Katherine is the daughter of Francis A. Drexel, Philadelphia banker and philanthropist. She entered the novitiate of the Sisters of Mercy, Pittsburgh, May 6, 1889, and was professed two years later. Present at the profession were Archbishop Ryan, of Philadelphia; Bishop Phelan, of Pittsburgh; Bishop Marty, of the Dakota Vicariate. A solemn Mass of thanksgiving in honor of the jubilee was celebrated at Duquesne University on February 12. The Fathers of the Holy Ghost shared in the early religious training of the novice and cooperate with her Sisters in laboring among the colored people. Mother Irenaeus Dougherty, Superioress of the Sisters of Mercy of the Diocese of Pittsburgh, was in the novitiate with Mother Katherine.

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The Bishops' Committee on the Confraternity of Christian Doctrine has proclaimed Sunday, May 18, as Biblical Sunday, with the object of promoting interest in the labors of the Board of Scriptural Scholars. The Bishops' Committee is composed of Most Rev. John T. McNicholas, D.D., Archbishop of Cincinnati; Most Rev. John Gregory Murray, D.D., Archbishop of St. Paul; and Most Rev. Edwin V. O'Hara, D.D., Bishop of Kansas City.

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A lawyer, Timothy P. Galvin, of Hammond, Indiana, was elected Supreme Master of the Fourth Degree, Knights of Columbus, to succeed John H. Reddin, of Denver, who died recently following thirty years in office. Mr. Galvin has been a member of the Supreme Board of Directors of the Knights of Columbus since 1933.

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Headquarters of the United States Province of the Holy Ghost Fathers were moved to Washington, D. C., on March 1.

The recently enthroned Archbishop of Dublin, Most Rev. J. C. McQuaid, is a member of this Congregation, and was formerly a member of the Faculty of Blackrock College.

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Rt. Rev. Msgr. Michael J. Ready, General Secretary of the National Catholic Welfare Conference, delivered the Benediction at the third inaugural of the President of the United States.

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In front of the Dominion Archives Building in Ottawa, there has been recently placed a statue of Sir Arthur Doughty, former Dominion Archivist, by order of the Canadian House of Commons. A convert to Catholicism, Sir Arthur was responsible for the establishment and the development of the Canadian Archives.

A Catholic attorney of Philadelphia, Michael Francis Doyle, was named permanent president of the Electoral College which met for the election of the President. He had been acting president since the meeting of the electors in 1933 for the first election of the President.

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Most Rev. John Mark Gannon, D.D., D.C.L., Bishop of Erie, has announced the establishment of a college in Erie for the education of young men of northwestern Pennsylvania, "of any creed or color" and "at a minimum cost".

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The National Catholic University of Brazil, founded in August after years of preparation, in pursuance of a decree of the First Brazilian Plenary Council, will commence regular classes this month.

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The golden sacerdotal jubilee of the Archbishop of Santiago and Primate of Chile, and the thirtieth anniversary of his episcopate was celebrated with the civil authorities, including the President participating. Paternal greetings were extended to him from Pope Pius XII by the Papal Nuncio. Most Rev. Jose Maria Caro Rodriguez, the jubilarian, spoke of the harmony existing between Church and State.

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In the first ceremony of his inauguration as Governor of Rhode Island, J. Howard McGrath assisted at Mass and received Holy Communion is his parish church in Providence.

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For the first time in its long history Connecticut has a Catholic as governor. He is Hon. Robert A. Hurley, inaugurated for a two-year term. He was formerly State Commissioner of Public Works.

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Governor Francis Parnell Murphy of New Hampshire, has received membership in the Sovereign Order of the Knights of Malta.

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Fifty years since "Rerum Novarum" and ten since "Quadragesimo Anno"! The double anniversary will be observed in Kansas City on May 22 by a national conference with the theme, "A Good Life in an Industrial Era".

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Nine members of the hierarchy from the South met in Birmingham, Ala., recently to plan the second annual meeting of the Catholic Committee of the South, April 20-22.

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Most Rev. Vincent Ryan, D.D., Bishop of Bismarck, president of the National Catholic Rural Life Conference, will address the seminary department of the National Catholic Educational Association on "The Seminary and the Rural Problem" at the thirty-eighth annual convention in New Orleans, April 16-18.

DIGNITIES

Most Rev. Robert E. Lucey, D.D., Bishop of Amarillo, was named Archbishop of San Antonio in an announcement made by the Most Rev. Apostolic Delegate. The Archbishop succeeds to the See left vacant by the death of Most Rev. Arthur J. Drossaerts, who died September 5, 1940.

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On February 24, Most Rev. Francis J. Magner, D.D., was consecrated Bishop of Marquette in Holy Name Cathedral, Chicago, by Most Rev. Samuel A. Stritch, D.D., Archbishop of Chicago. The co-consecrators were Most Rev. Eugene J. McGuinness, D.D., Bishop of Raleigh, and Most Rev. William D. O'Brien, D.D., Auxiliary Bishop of Chicago. Most Rev. Francis C. Kelley, D.D., Bishop of Oklahoma City and Tulsa, delivered the sermon.

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On February 18, Most Rev. Joseph C. Plagens, D.D., was solemnly installed in St. Andrew's Cathedral, the fifth bishop of Grand Rapids, by Most Rev. Edward Mooney, D.D., Archbishop of Detroit.

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Most Rev. Joseph T. McGucken, D.D., Chancellor of the Archdiocese of Los Angeles, was promoted to be Titular Bishop of Sanavus and Auxiliary Bishop of Los Angeles.

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Very Rev. Francis J. Brennan, J.U.D., who recently assumed his duties as Auditor of the Sacred Roman Rota, has been named a member of the superior council of the Pontifical Work of the Propagation of the Faith and of the Pontifical Work of St. Peter Apostle for Native Clergy. He succeeds as the representative of the United States on these councils the Most Rev. Joseph P. Hurley, D.D., Bishop of St. Augustine.

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The Vicariate Apostolic of the Hawaiian Islands has been raised to the rank of a diocese and created a suffragan See of the Archdiocese of San Francisco. It became a Prefecture in 1826 and a Vicariate in 1844.

UNIVERSITY

The annual retreat for priest students of the University was conducted in the chapel of Caldwell Hall from Ash Wednesday to the First Sunday of Lent by Most Rev. William O. Brady, D.D., S.T.D., Bishop of Sioux Falls.

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The first annual dinner meeting of the professors and students of the School of Canon Law was held in the Willard Hotel on Wednesday, February 12. The committee of student priests was headed by Rev. Carl A. Meier. The toastmaster was Rev. Benjamin F. Farrell.

FIRST ANNUAL MEETING AND DINNER
CANON LAW SCHOOL 1941 OF
CATHOLIC UNIVERSITY
[illegible] HOTEL FEBRUARY 12, 1941

Promotions were extended in the School of Philosophy to Rev. John K. Ryan, S.T.B., Ph.D., and Rev. Jules A. Baisnee, S.S., S.T.D., Ph.D., both of whom became associate professors of philosophy.

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Catholic and non-Catholic lawyers of the District of Columbia, together with students of the School of Law, are participating in religious round table conferences each Sunday morning in the Auditorium of McMahon Hall from February 16 to April 6.

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At the end of the first semester the members of the third year class of the School of Canon Law bade regretful farewell to Very Rev. Joseph A. Hickey, O.S.A., S.T.M., J.C.D., Vice General of the Order of St. Augustine, whose semester course on procedure in *ratum et non consummatum* cases fulfilled the highest expectations entertained of a Consultor of the Sacred Congregation of the Sacraments, a post he occupied until the threat of war.

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A Regional Congress of the National Federation of Catholic College Students was held at the University on March 2. The delegates assisted at a *missa recitata* in the National Shrine of the Immaculate Conception. The topic for the general meeting in the morning was *Defense in Democracy*. Panel meetings in the afternoon took up the following subjects: international relations, liturgy, radio, war relief, and youth movements.

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Very Rev. Thomas V. Moore, M.D., Ph.D., head of the department of psychology, lectured at Seton Hill College, Greensburg, Pa., on February 19, on "Mental Problems of Children". On the following evening, he spoke in the Foster Memorial Auditorium of the University of Pittsburgh under the auspices of the Catholic Nurses League of the Diocese of Pittsburgh. His subject was "The Problem of the Family and the Child."

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The lay students observed all-night adoration of the Blessed Sacrament in the Chapel of Gibbons Hall on Saturday, March 1, the closing night of their annual retreat.

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A series of two lectures under the auspices of the Institute of Ibero-American Studies was given in McMahon Hall by Professor Victor Andres Belaunde, of Catholic University, Lima, Peru, authority on International and Constitutional Law, the first on the crisis of modern culture, and the second on the ethical and cultural bases of Pan-Americanism.

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Rev. Valentine Schaaf, O.F.M., S.T.B., J.C.D., Definer General of the Order of Friars Minor, and Consultor of the Sacred Congregation of Religious, is giving a course this semester at the Pontificium Institutum Antonianum.

Rev. Joseph Comyns, C.SS.R., (J.C.L. 1938) is teaching Canon Law at Mt. St. Alphonsus, Esopus, N. Y.

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Rev. Joseph F. Hart, C.SS.R., (J.C.L. 1940) is assigned to missionary work in Southern Pines, N. C.

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On Friday, March 7th, the University celebrated the Feast of St. Thomas Aquinas, Patron of all Catholic Schools. Solemn High Mass was celebrated in the National Shrine by the Very Rev. Dr. Ignatius Smith, O.P., Ph.D., Dean of the School of Philosophy. The sermon was preached by the Rev. Dr. Robert J. Slavin, O.P., Ph.D., of the Faculty of the School of Philosophy. The Teaching Staff and their families, the Superiors, the students and members of communities attended. Academic costume was worn.

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A Solemn Anniversary Mass of Requiem was celebrated in the National Shrine on Monday, March 10, for the repose of the soul of the late Most Reverend Thomas J. Shahan, Bishop of Germanicopolis, the former Rector of the Catholic University. The celebrant of the Mass was Right Reverend Monsignor Patrick J. McCormick, Ph.D., Vice-Rector of the University.

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The second anniversary of the coronation of our Holy Father Pope Pius XII was commemorated by the University on Wednesday, March 12th. The Teaching Staff with their families, the students, the Superiors and the members of religious communities attended. Solemn Pontifical Mass was celebrated in the National Shrine of the Immaculate Conception by His Excellency, the Most Reverend Amleto Giovanni Cicognani, D.D., Archbishop of Laodicea and Apostolic Delegate to the United States. The sermon was preached by His Excellency, the Most Reverend Francis J. Spellman, D.D., Archbishop of New York.

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Most Rev. Joseph M. Corrigan, D.D., rector, delivered the benediction at the first joint dinner of the Presidential electors.

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Most Rev. Joseph M. Corrigan, D.D., rector, and Most Rev. James H. Ryan, D.D., Bishop of Omaha and former rector, were made honorary members of the newly established chapter of Phi Beta Kappa, inaugurated in the School of Arts and Sciences.

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Rt. Rev. Msgr. Francis J. Haas, Ph.D., was designated by the United States Conciliation Service as special representative to seek settlement of the strike at the Allis Chalmers Manufacturing Company in Milwaukee.

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Five years ago, Most Rev. George L. Leech, D.D. (J.C.D. 1922), was enthroned as Bishop of Harrisburg.

Rt. Rev. Msgr. Peter Guilday, Ph.D., professor of American Church History, has been delegated by the executive council of the American Catholic Historical Association to serve on a Government commission which will represent the United States at the Pan-American Conference on History and Geography, to be held at Lima, Peru, March 30 to April 8.

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An "Arctic Institute" is projected by Rev. Hugh O'Neill, assistant professor of biology and curator of the Langlois Museum, and Rev. Artheme Dutilly, research assistant in botany, for the study of the inhabitants of that area, their artefacts, the flora, the fauna, the minerals, and the soil.

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The School of Social Work, established in 1934, has been admitted to full membership in the American Association of Schools of Social Work.

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THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

Summaries of Papers

I. (a) Date: January 22, 1941.

(b) Title: The History of the Holograph Testament in the Civil Law.

(c) Author: Dr. Reginald Park of the Department of Justice.

(d) Abstract:

The institution of the holograph will, which is to be found in many, if not most of the codes of the civil law countries, was derived from the Roman law. Neither classical Roman law nor Justinian's compilations recognized this form of last will. But a *novella* to the *Codex Theodosianus*, the most important pre-code before Justinian's legislation, from the year 446 generally permitted the holograph testament (formerly permitted only in emergency cases). Although this was not put into the *Corpus Juris Civilis*, Valentinian's amendment was, like the whole *Codex Theodosianus*, of very great importance to legal development in France.

This Code embodied the Roman Law under which the various people of France lived, whereas Justinian's compilations were received only in the later Middle Ages. Thus one could assume that the holograph testament which is found in the earliest days of French legal history, as well as in the time preceding the so-called Code Napoleon, was taken from this pre-Justinian Roman law. But the study of legal sources and documents shows that this is not the case. Holograph wills came into recognition because of customary law. It is the most reasonable and practicable form of last wills which a reluctant legislation could not resist

From the French *code civil,* the institute was adopted by many European and American codes. It is, however, interesting to note that the Austrian code of 1811, entirely uninfluenced by the French code, also established the holograph testament following old Austrian customs, particularly in force in Bohemia, Syria and Upper Austria. It is a sound and reasonable form of will. Common law states should not hesitate to introduce it.

II. (a) Date: February 20, 1941.

(b) Title: Manifestations of Roman Procedure.

(c) Author: Dr. Roscoe J. C. Dorsey, Professor of Jurisprudence at the Washington College of Law.

(d) Abstract:

The paper traced Roman Procedure from its earliest phase of self-help to Imperial state-help. Did Adjective precede Substantive law? Arbitration, jurisdiction, *ius* and *lex* were discussed. Great forces such as were exerted by the *Pontifex,* the *Praetor Urbanus,* the *Praetor Peregrinus,* and the Edicts were emphasized together with the *actiones leges,* the Formulary Procedure and the *Actio.*

The status of the fact-finders was referred to *iudices, centumviri, recuperatores,* and *decemviri.* In the interdict procedure and *in integrum restitutio,* the Roman law found remedies against itself. Concentration of Roman justice was identified with the Imperial system. Imperial *edicta, decreta, mandata, rescripta, orationes, sanctio pragmatica, epistola,* and *subscriptio* were aids.

The Senate was an imperial instrument to further the will of the Emperor. New paths were made when the emperor proceeded *extra ordinem* and an Imperial *Ius Extraordinarium* resulted. A simplified procedure eventually obtained. In this paper we really have the background of early English procedure in law and equity.

(a) Date: March 20, 1941.

(b) Title: The Military Will in Roman Law.

(c) Author: Dr. Egon Weiss, Professor at the University of Prague (paper read in *absentia*)

(d) Abstract:

There is much tradition in regard to the Roman military will. This historical material seems to be very precise, but this quality exists only when the various pertinent accounts are considered individually. The sources when considered in their entirety show contradictions in fundamental points and may not be entirely complete. The author traces the sources for the Roman military will in chronological order. He demonstrates that the older view which connects

the Roman military will with the archaic "*testamentum in procinctu*" is outmoded.

The military will is frequently traced only to the *mandata*, and Ulpian gives some occasion for this, by referring only to the *caput ex mandatis*, a chapter on military law which was endorsed by the Emperors following Nerva as a military handbook. However, Gaius more correctly traces the military law to the constitutions of numerous emperors commencing with Titus. These constitutions in their aggregate force gave the soldier, by the time of Trajan, almost complete freedom from formalities even as regards heirs.

An exception to the latter freedom seems to be found in the Gnomon of Ideologos with regard to Greek-Egyptian soldiers, who were restricted to constituting only persons of the same race as their heirs. But the reason seems to have been fiscal. And the restriction is mentioned nowhere else in the sources, so that it seems to have been transitory.

The Gnomon, on the other hand, permitted the soldier to make a military will even when he was absent on leave. But at least after the Constitution of Justinian (529) only soldiers actively on duty had the privilege; and a will duly made by a soldier on duty was valid for only a year after his discharge.

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A course in Oriental Church Law is being given to priests in the third year of the School of Canon Law by Willibald M. Plöchl, LL.D. (Vienna, 1931). Dr. Plöchl was assistant professor from 1935 to 1938 in the University of Vienna for Canon Law, Political Philosophy, History, and the History of Canon Law. He was professor of the History of Canon Law at the Catholic University of Nijmegen, Holland, from 1938 to 1940. He was contributing editor to the Vienna "Reichspost" in 1930 and 1931, and editor of the Austrian Catholic Students' Review, "Oesterreichische Akademische Blätter" from 1935.

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A month's course on accounting was given during February to the priests in the third year of the School of Canon Law by William M. Deviny, Ph.D.

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A program was presented on Sunday, March 23, by the Clerical Unit of the Confraternity of Christian Doctrine, on the general topic, "Teaching Religion by Parents in the Home". Most Rev. Peter L. Ireton, D.D., Coadjutor Bishop of Richmond, was the principal speaker.

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The first assembly of the Nineteenth General Meeting of the Academy of World Economics in association with the Annual Washington Meeting of Pi Gamma Mu, National Social Science Honor Society, was held in McMahon Hall, on March 21. Rt. Rev. Msgr. John A. Ryan, D.D., presided. The general topic of the meeting was "General Crises in World History". At the

assembly in McMahon Hall, a paper was read by Rev. William J. McDonald, Ph.D., of the School of Philosophy. His subject was "Christian Philosophy and Contemporary Social Problems".

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Rev. John K. Ryan, Ph.D., of the School of Philosophy, will take part on April 2 in the debate to be held in the Coolidge Auditorium of the Library of Congress. The debate will turn on the book of Friedrich W. Foerster, "Europe and the German Question", and will inquire into the historical and philosophical roots of the background of the European War.